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Summaries of
Decisions
Volume 25
(1993)

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Summaries of Decisions

Volume 25 (1993)

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS* - VOLUME 25

CITED 1993 25 C.R.A.T.

- * This volume contains in some instances full decisions and reasons given, and in others, summaries only of Tribunal decisions and Supreme Court of Ontario decisions. If reference to the exact decision is desired, a request should be made to the Registrar.

Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario, 1990, Chapter M.21

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DWYER FUNERAL HOME

APPEAL FROM A DECISION OF THE
COMPLAINTS COMMITTEE OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
GERRY BEECH, Member
WILLIAM HASKETT, Member

APPEARANCES:
WAYNE R. RICHARD, representing the Applicant
DONALD POSLUNS, representing the Board of
Funeral Services

DATES OF 13, 14 May;
HEARING: 1 October 1993. Toronto

REASONS DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal pursuant to the provisions of Section 14(6) of the Funeral Directors and Establishments Act. The circumstances of the holding of the hearing and the presentation of the evidence to the Tribunal are set out in the Reasons for the Tribunal's Ruling on a motion to determine the question - when a "person complained against" receives a copy of a proposal pursuant to Section 14(6) of the Act and requires a hearing as provided in that subsection and the hearing proceeds before the Tribunal as provided in subsection (8), upon which party at the hearing does the burden of proof lie? These reasons were released by the Tribunal on July 30, 1993, and the ruling directed that the onus of proof at this hearing is upon the Registrar of the Board of Funeral Services and not upon the Dwyer Funeral Home and Mr. Joseph Tingle. October 1, 1993 was then fixed as the date to complete the hearing and it was, in fact, completed on that day.

At the opening of the hearing on October 1, counsel for the Applicant sought to make a motion for a non-suit. Counsel for the Registrar opposed this. The Tribunal ruled that a motion for non-suit was not in order. Albeit in somewhat unusual circumstances, evidence had been called and presented on behalf of the Applicant and the Tribunal was of the view that it should make the Order required of it by Section 16(9) of the Act upon all of the evidence before it and not upon a motion for non-suit.

The evidence before the Tribunal consists of the original letter of complaint from Mrs. Fay Newton, dated August 28, 1991

(Exhibit 8 herein with certain documents attached thereto including copies of her contract and of the invoice received therefor), the response thereto by way of letter dated September 26, 1991 to the Board of Funeral Services from Dwyer Funeral Home over the signature of Mr. Joseph Tingle (Exhibit 9) with the documents enclosed therewith which included the then current itemized master price list (Exhibit 7), a document stated to be a consolidation package price for a Hamilton traditional funeral plus a selected casket (Exhibit 14), and certain other correspondence between Mrs. Newton and the Dwyer Funeral Home and between the Dwyer Funeral Home and the office of the Registrar, a copy of a memo prepared by Sheila Nunn, an investigator for the Board of Funeral Services which was prepared for the Complaints Committee (Exhibit 18), copies of notes made by Sheila Nunn following telephone conversations with various persons (Exhibits 19-23), the decision of the Complaints Committee (Exhibit 24) and the oral evidence given at the hearing by Mr. Edward Powell, President of Dwyer Funeral Home Limited, Mr. Joseph Tingle, the licensed funeral director in charge of the funeral home in question and against whom the complaint was made, Jessie Hay, an employee of the funeral home and of Sheila Nunn, the investigator aforementioned. We shall deal with the evidence in more detail under the headings of the various issues raised with which we have to deal.

Before dealing with each issue specifically, however, we wish to make a few general comments. In the first place, it should be noted that upon the evidence presented by both sides at this hearing, there is not a great deal of dispute as to the facts. However, to the extent that there is any such dispute between the evidence of Mr. Tingle who appeared before the Tribunal and gave his evidence under oath subject to cross-examination, and the evidence contained in the written complaint of Mrs. Newton who did not come to the hearing and in the notes of Sheila Nunn made following conversations with other persons who were not called as witnesses either, the Tribunal has concluded that Mr. Tingle's evidence should be accepted. Wherever there is a discrepancy between his version of the events and that put forward in Mrs. Newton's letters and the versions given to Sheila Nunn on the telephone, the version of events put forward by Mr. Tingle is accepted by the Tribunal as being the correct one. Mr. Tingle appeared to us to give his evidence in an honest and straightforward manner and, upon cross-examination, he showed no attempt to avoid any facts which might damage his case. He explained exactly how the document, Exhibit 14, was taken out of a stapled copy of the master list being Exhibit 7, and how he used these documents. He said that throughout the discussion with Mrs. Newton, she did not appear to be distraught and that she appeared to know what she wanted as some persons do but others do not.

The complaints made against Mr. Tingle and the Dwyer Funeral

Home were:

1. Mrs. Newton was not told she could purchase an urn for the ashes of the deceased.
2. She was not told of and given the opportunity to discuss the renting of a casket.
3. The charge of opening the grave for the ashes was rendered twice or even perhaps three times.
4. Mr. Tingle did not "offer" a copy of the price list to Mrs. Newton as required by the Regulations.
5. The price list did not contain packages as required by the Regulations.

Issue of the urn

Mr. Tingle stated in his evidence before us that Mrs. Newton and those with her (her mother and a friend) asked her about urns and he showed them some 15 urns which were set out. He told them that the cost of an urn would be extra. It was his evidence that about one-half of the people who have bodies cremated purchase urns. There was also support for Mr. Tingle's evidence on this point in the evidence of Jessie Hay. She said that Mrs. Newton had asked her for prices on urns which she gave to her and Mrs. Newton said she would get back to her about an urn, but she did not do so. In view of our comments and finding above concerning the evidence of Mr. Tingle, we accept his evidence on this point and resolve this issue in his favour.

Issue of rental of a casket

In his evidence, Mr. Tingle said that they did discuss the rental of a casket, they discussed prices and he told them that he could get a certain casket for a purchase from a manufacturer for a lower price of \$625 which they chose and which formed part of the contract. We accept the evidence of Mr. Tingle and resolve this issue in his favour.

Issue of the charges for the grave

In a letter dated December 6, 1991 from Mr. Powell to the Board of Funeral Services (Exhibit 11), he deals with this issue:

During our discussions, Ms. Newton advised us:

1. Her Uncle Art Clairmont paid \$135.00 to be forwarded to Holy Sepulchre Cemetery.

2. Her Uncle Homer Clairmont paid \$135.00 to be forwarded to Holy Sepulchre Cemetery.

3. Her mother, Mrs. David Clairmont paid \$135.00 to be forwarded to Holy Sepulchre Cemetery;

and that she had receipts from Mr. Joseph Tingle for the above. We have records of only receiving funds from Mr. Homer Clairmont, copy attached, for the grave opening at Holy Sepulchre Cemetery.

We take this matter very seriously. Ms. Newton says you have the receipts (or copies thereof).

If we have in error forwarded three payments to Holy Sepulchre, we must immediately make the appropriate refunds.

If there is any reason to believe there may be a breach of fiduciary trust, we request you begin an immediate investigation.

Sheila Nunn replied to Mr. Powell by letter of December 19 (Exhibit 12) in which she said:

To date we have not received copies of receipts for \$135.00 from Art Clairmont or for \$135.00 from Mrs. David Clairmont. I did however receive a copy of the receipt issued to Mr. Homer Clairmont for \$135.00.

I have requested copies of the two missing receipts from Mrs. Newton and will send you copies when I receive them.

The receipts to the other two parties never materialized and there is no reference to this issue in either Sheila Nunn's memo to the Complaints Committee or in its decision. Therefore, upon the evidence we have, no finding whatever can be made against the funeral home or against Mr. Tingle on this point.

Issue of offering the price list

Section 41(6) of Ontario Regulation 368/90 made under the Funeral Directors and Establishments Act provides:

(6) Every operator of a funeral establishment offering services to the public shall, before a potential purchaser selects funeral services, supplies or transfer services, offer to that purchaser a copy of the lists referred to in subsections (1) and (3).

In her original letter of complaint, Mrs. Newton said "I was never shown a price list". But she also said:

The only price list I was ever shown was what the funeral cost, which did not give me absolutely no indication of what I paid for, also a lot of unnecessary charges such as the reopening of the grave these were paid by other means. All the prices indicate is the package offering that cost of \$2,660.00 but I do not know?

In his response by letter of September 26, 1991, Mr. Tingle said:

Our firms' price lists are always available in our display room and were on the desk throughout the arrangements. I cannot recall who read them and for how long, but they were most definitely in use during these arrangements. The price list Mrs. Newton refers to seeing is our only price list, and a copy of this list is filed with the Board of Funeral Services.

In his oral evidence before us, Mr. Tingle said that there were copies of the price list in the front office and in the casket selection room. He said that there was a sign clearly posted where people came in stating that price lists were available for everyone to see and he said that copies were on the table where the parties sat when they discussed the various items and made up the contract. Mr. Tingle wrote from one of these and wrote the relevant figures upon it and a copy was equally available to Mrs. Newton.

Upon all of this evidence, the Tribunal finds that a copy of the price list was offered to Mrs. Newton as required by the Regulations. We accept the evidence of Mr. Tingle that the document on the table was a copy of the only price list there was and we have the statement of Mrs. Newton in her letter that she did see it and saw and noted certain things in it. To go further than

what was done here would be to require the operator of a funeral establishment not only to offer a copy of the price list, but also to require the customer to read it and get certain information from it. The requirement of the Regulation does not go this far.

Issue of packages in the price list

Section 41(2) of the aforementioned Ontario Regulation 368/90 reads:

(2) The list referred to in subsection (1) shall include,

.....
(i) the price of funeral services and supplies and transfer services offered as a package, indicating each item included in the package;

It is clear on the evidence that the price list offered was a copy of Exhibit 7. This price list does not contain packages as contemplated by the Regulation. To put together the "package" finally chosen by Mrs. Newton, Mr. Tingle had to go through the general list of items, circle certain ones, add in figures, and then work out a total. This was not a package as contemplated and required. The Complaints Committee was therefore justified in its finding on this point, "The price list contained no packages and yet Ms. Newton was given a package price on the contract. The Committee is of the opinion that this is not acceptable."

The Complaints Committee concluded its decision with an admonition of Mr. Tingle. Insofar as admonishment of Mr. Tingle where professional misconduct is concerned, we have determined that he did comply with the requirement to "offer" the price list and, therefore, no admonition is in order on this ground. We have found that the price lists did not meet the requirements of the Regulations, but admonition for this shortcoming should be directed more toward the person or persons responsible for their preparation. There was no evidence before us as to who did this or what, if any, input Mr. Tingle had into it.

Therefore, pursuant to the authority vested in it pursuant to Section 14(9) of the Funeral Directors and Establishments Act, the Tribunal directs the Complaints Committee to amend its decision in accordance with the findings and conclusions set out herein.

TREVOR BISNATH

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MORTGAGE BROKERS ACT

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: THERESA WALSH, Vice-Chair, presiding
SELWYN CHARLES, Member
EDWIN WEISS, Member

APPEARANCES:

THOMAS M. SHEPPARD, counsel representing the Applicant

ISABELLE O'CONNOR, counsel representing the
Registrar under the Mortgage Brokers Act

DATE OF

HEARING: 1 April 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Mr. Trevor Bisnath of a Proposal of the Registrar under the Mortgage Brokers Act (the "Act") to refuse to grant the Applicant registration as a mortgage broker.

By Proposal dated September 15, 1992, the Registrar determined that Mr. Bisnath was not entitled to registration on the grounds that under section 5(1)(a) of the Act: "Having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business".

The basis for the Registrar's finding of a material lack of financial responsibility is Mr. Bisnath's personal bankruptcy in 1991, which arose out of real estate investments, and left eight outstanding writs of execution totalling 1.4 million dollars registered against him.

According to an Agreed Statement of Facts dated April 1, 1993, Mr. Bisnath applied for registration as a mortgage broker on March 26, 1991. On August 27, 1991, Mr. Bisnath voluntarily declared bankruptcy, as a result of being unable to meet his financial commitments to the mortgagees of five residential and commercial real estate properties in Metropolitan Toronto, the properties being purchased in 1988 and 1989. Mr. Bisnath was granted an absolute discharge from bankruptcy on April 28, 1992.

A Sheriff's Certificate dated April 18, 1991, lists eight writs of execution filed against Mr. Bisnath, individually or with others, from September 1990 through to February 1991. The writs are filed on behalf of commercial lenders principally, being The Bank of Nova Scotia, Home Savings and Loan Corporation, Central Guaranty Trust Company, Settlers Savings and Mortgage Corporation, and Louis Smith and Evelyn Himel of Toronto, for a total, according to the Agreed Statement of Facts, of 1.4 million dollars.

In the Registrar's opinion, the personal bankruptcy of an applicant is not in itself a permanent impediment to registration as a mortgage broker. However, given the substantial amount of money involved in Mr. Bisnath's bankruptcy and the fact that the bankruptcy arose out of real estate investments, the Registrar expressed concern regarding the potential risk to the public in this regulated industry, should the applicant be registered.

Additionally, in testimony, the Registrar expressed some concern regarding what in his view amounted to a lack of full disclosure on the part of Mr. Bisnath in his application of March 1991. However, the Registrar made it clear that the issue of the applicant's alleged non-disclosure was not the basis of the Proposal to refuse registration, nor a significant concern of the Registrar.

Mr. Bisnath, on his application of March 1991, disclosed only 5 of the 8 outstanding judgments against him, being as follows:

a) Central Guaranty Trust Corporation	-	\$215,000
b) Home Savings and Loan Corporation	-	\$85,000
	-	\$77,420
	-	\$85,095
c) Bank of Nova Scotia	-	<u>\$18,686</u>
TOTAL	-	<u>\$481,201</u>

In a letter dated October 10, 1991, in response to a request by the Registrar for further information regarding the applicant's financial affairs, Mr. Bisnath did not disclose the existence of the three remaining outstanding judgments.

In testimony, Mr. Bisnath stated that he had received no notice as of March 1991, being his date of application, of the last 3 judgments obtained against him, being filed in December 1990, January 1991 and February 1991. He thus took the position that his application was completed to the best of his knowledge at the time of the application.

However, in reviewing the Sheriff's Certificate of April 1991, it is clear that the outstanding judgments that were not disclosed by Mr. Bisnath in his application of March 1991 are in favour of the following:

- a) Home Savings and Loan Corporation - \$327,632.89
Filed September 24, 1990.
- b) Louis Smith and Evelyn Himel - \$34,059.84
Filed September 9, 1990.
- c) Settlers Savings and Mortgage Corporation - \$441,808.81
Filed January 28, 1991.

TOTAL - \$803,501.54

It should also be noted that according to the Sheriff's Certificate the only apparent judgment on behalf of Central Guaranty Trust Corporation is \$153,629.13, with interests and costs.

This apparent lack of disclosure on the part of Mr. Bisnath in his application for registration as a mortgage broker, dated March 1991, would, in the view of this Tribunal, be a source of concern as it relates to the grounds for refusal of registration articulated under section 5(1)(b) of the Act.

However the Tribunal, following the guidance of the Divisional Court in Brenner v. Registrar of Motor Vehicles and Salesmen, decision released April 7, 1983, notes that the Registrar's concerns are premised upon the position that this Applicant is not yet ready to take on the role of mortgage broker due to his past financial irresponsibility pursuant to section 5(1)(a) of the Act.

The Registrar thus proposed in his testimony that the Applicant work for an additional 2 years and, if at the end of this period, there are no consumer complaints and no indicators of financial irresponsibility, the Applicant would then be considered for registration as a mortgage broker.

According to the Agreed Statement of Facts, Mr. Bisnath has been employed by Hannah Financial Corporation since June 1992. It was further agreed at this hearing that there had been no consumer complaints against Mr. Bisnath during the period of his employment. Several letters of recommendation on behalf of Mr. Bisnath were submitted into evidence without cross-examination.

The Tribunal notes that the Act does not require a specified

period of time over which an applicant, who has been refused registration under section 5(1)(a), must evidence financial responsibility in order to be granted registration as a mortgage broker.

The Tribunal further notes that this Applicant made his initial application to be registered over two years ago in March 1991. Mr. Bisnath has now been employed and supervised in the financial industry for approximately a year, without consumer complaint. He also obtained an absolute discharge from bankruptcy in April 1992.

Given these factors, the Tribunal is of the opinion that the mere passage of additional time would not in itself render Mr. Bisnath's application for registration more suitable.

Accordingly, by the authority vested in it by virtue of section 7(4) of the Act, this Tribunal directs the Registrar to carry out his Proposal to refuse to grant the Applicant registration as a mortgage broker under the Mortgage Brokers Act. However, given the facts of this matter and the evidence presented, this Tribunal recommends that the Registrar, in exercising his discretion, favourably reconsider the application of this Applicant for registration as a mortgage broker, should the Applicant choose to make a further application, pursuant to the terms of Section 10 of the Act, as early as October 1, 1993 onwards.

MURRAY VICTOR BLAKE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MORTGAGE BROKERS

TO REFUSE THE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding

APPEARANCES:

HOWARD YEGENDORF, representing the Applicant

GRETCHEN TIMMINS, representing the Registrar under
the Mortgage Brokers Act

DATE OF 14, 15, 16, 17, 18 December 1992

HEARING: 8 February 1993

Toronto

REASONS FOR DECISION AND ORDER

Murray Victor Blake, of Ottawa applied for registration as a mortgage broker and the Registrar of Mortgage Brokers proposed to refuse to register him in a Notice of February 19, 1992. Blake appealed from that Proposal and later two Notices of Further or Other Particulars in this matter were issued by the Registrar on September 16 and December 4, 1992. At the commencement of the hearing, the parties through their counsel filed an Agreed Statement of Facts (Exhibit 22) which is dated December 14, 1992 and states:

" IN THE MATTER OF THE MORTGAGE BROKERS ACT
R.S.O. 1990, CHAPTER M.39

- AND -

IN THE MATTER OF THE APPLICATION FOR REGISTRATION OF
MURRAY VICTOR BLAKE

AGREED STATEMENT OF FACTS

A. BACKGROUND INFORMATION

1. Murray Victor Blake ("Blake") has submitted an application for registration under the Mortgage Brokers Act R.S.O. 1990, chapter M. 39 (the "Act") as a sole proprietor.

2. Blake's application for registration states that his prior employment was with Can Corp Financial Services Ltd. ("Can Corp") where he was employed from February 1, 1985 to August 31, 1991.
3. On April 16, 1984 Can Corp was incorporated under the laws of the Province of Ontario. At all material times Urbo-Tech Properties Ltd. ("Urbo-Tech") was the majority voting shareholder of Can Corp and Blake was a minority non-voting shareholder. Urbo-Tech was owned equally by Vincent, Rocco and Tony Campanale, Ross Bryans and John McKee ("McKee") and up to in or about 1985 was also owned equally by John Piazza and Steve Polowin.
4. On October 11, 1984, Can Corp was initially registered as a mortgage broker under the Act.
5. On August 15, 1985, Blake became president and a director of Can Corp. Blake retained these positions until January, 1991.
6. On August 15, 1985, McKee became vice president and a director of Can Corp and retained these positions until June 22, 1990 when McKee was terminated by Can Corp.
7. From August 15, 1985 to June 22, 1990, the board of directors of Can Corp was comprised of Blake and McKee.
8. On October 31, 1985, Blake assumed the position of secretary treasurer of Can Corp and retained this position until January, 1991.
9. On January 7, 1991, a receiving order was issued by the Ontario Court (General Division) in Bankruptcy against Can Corp pursuant to which Deloitte & Touche Inc. ("Deloitte & Touche") was appointed as trustee in bankruptcy.

10. From in or about January of 1991, the Registrar of Mortgage Brokers (the "Registrar") permitted Can Corp to continue its registration as a mortgage broker but only under the direct supervision of Deloitte & Touche. The Registrar would not permit Can Corp to continue to be registered as a mortgage broker after September 20, 1991.

B. Investigation of the Registrar into the Affairs of Can Corp

11. In or about September of 1989, the Registrar commenced an investigation into the business practices of Can Corp.
12. On or about September 13, 1989, the Registrar appointed Coopers & Lybrand to make an inspection of Can Corp pursuant to section 21 (1) of the Act to ensure that its provisions and regulations were being complied with by Can Corp.
13. Blake told representatives of Coopers & Lybrand in September of 1989 that the practice of guaranteeing principal and interest repayments had not been continued subsequent to approximately August 1, 1989 but that renewals of existing mortgage investments continued to be guaranteed.
14. As a result of its findings, Coopers & Lybrand recommended that the Registrar monitor Can Corp's mortgage portfolio and deal with the practice of guaranteeing.
15. On or about October 5th of 1989, Blake and McKee and Can Corp's auditors from Peat Marwick Thorne met with the Superintendent of Deposit Institutions, Mr. Brian Cass, other representatives of the Ministry of Financial Institutions (the "Ministry") including the Registrar, and representatives of Coopers & Lybrand in Toronto. At this meeting, it was agreed that Coopers & Lybrand were to be appointed as monitor of Can Corp, and, Can Corp and its auditors, Peat Marwick Thorne,

were to work with Coopers & Lybrand towards a compliance 30 agreement that would reflect the requirements of the Ministry.

16. Negotiations ensued and ultimately an Undertaking dated July 12, 1990 was given to the Ministry by Can Corp and Urbo-Tech. The Undertaking included the following provisions:

- a. Can Corp would not issue any guarantees without full compliance with the Securities Act and acknowledged that to guarantee mortgages may constitute trading in securities which are not exempt from the registration and prospectus requirements of the Securities Act (Ontario);
- b. Can Corp confirmed that no **new** guarantees had been issued by Can Corp since October 5, 1989; however, guarantees issued prior to October 5, 1989 had been renewed on the renewal of the investment. Can Corp confirmed that Schedule A listed all of the renewals where the guarantee had been extended after October 5, 1989;
- c. Can Corp would not extend or renew any guarantees;
- d. Can Corp would only make payments of interest or principal to investors when these monies had in fact been received from the borrower;
- e. Can Corp would notify investors within thirty days of Can Corp becoming aware of each default in the payments on a mortgage;
- f. Can Corp would keep investors advised as to the status of the mortgage or mortgages in which the investor had invested;
- g. Can Corp would prepare all of its accounts in accordance with the Act;

- h. Can Corp would be at liberty to apply to the Registrar for consent to operate two separate trust accounts;
 - i. Can Corp would provide written appraisals of the property to be mortgaged to investors prior to making an investment;
 - j. Proceeds of a mortgage administered for an investor by Can Corp would not be transferred to a new mortgage without the prior written consent of the investor;
 - k. Coopers & Lybrand would be appointed monitor of Can Corp; and
 - l. Any material breach of certain paragraphs of the Undertaking would be grounds for the revocation of Can Corp's registration under the Act.
17. Prior to the execution of the Undertaking, the Registrar was notified by letter dated June 22, 1990 that McKee had been terminated as vice-president and an employee of Can Corp for cause.
18. In its role as Monitor of Can Corp, representatives of Coopers & Lybrand met with Blake in late August to review the company's progress in recovering on defaulted mortgages being administered by Can Corp. Blake indicated that shortfalls on defaulted mortgages, which Can Corp had guaranteed prior to the Undertaking, were expected to approach \$1 million. Blake expressed concern that Can Corp would be unable to generate sufficient cash flow to honour the guarantees. Blake agreed that Can Corp should not honour any guarantees using its own cash resources because, in the event that Can Corp was not able to honour all guarantees, it should not make payments to some investors and thereby jeopardize the position and potential recovery of others.

19. Coopers & Lybrand prepared a forecast which showed negative cash flows for the following months without making any provision for honouring the guarantees on defaulted mortgages.
20. Following a meeting with investors on October 22, 1990, and Coopers & Lybrand's solicitation of the views of investors who did not attend the meeting, **Coopers & Lybrand** applied to the court to be appointed monitor of Can Corp by reason of the investors overwhelming preference to allow Can Corp to continue to operate under the auspices of a monitorship regime.
21. Subsequently, Albertos Bulhoses and Sydney Greenberg applied for a receiving order upon having reached the conclusion that Can Corp was no longer able to meet its liabilities as they fell due. Accordingly, on January 7, 1991, a receiving order was made which adjudged Can Corp a bankrupt.

C. The Khoozani Mortgages

22. In or about January of 1988, Khoozani, a real estate developer, approached Can Corp after having heard of the company and having seen an ad in the Ottawa Citizen under "Money Loaned". The name of Po Krepski was given in the ad and Khoozani met with her at Can Corp's business premises.
23. Khoozani completed an application for a loan in the amount of \$60,000.00 to 149819 Canada Inc., a corporation of which Khoozani was the owner, sole officer and director, to be secured by way of a mortgage on a property in Quebec known as "Val des Monts." Khoozani negotiated the loan with Krepski; he subsequently met with Blake and Krepski and the mortgage was later approved by Blake and McKee.

24. Three investor loans to Khoozani were secured only by promissory notes although the investors were advised that they had an interest in a mortgage. These promissory notes were issued at a time when Khoozani was not making monthly payments on his borrowings as called for in the registered mortgages.

D. Mortgages in Default in Can Corp Portfolio

25. In the early part of 1989, McKee hired Richard Morgan ("Morgan") to be in charge of collecting on defaulted mortgages.
26. Morgan was introduced to Blake the day he started work at Can Corp. McKee told Blake in Morgan's presence that Morgan would be collecting on the defaulted mortgages.
27. Approximately three to four months after he started at Can Corp, Morgan had completed his overall report on the mortgages in default in Can Corp's portfolio. This report was given to Blake and McKee and then updated on a monthly basis.

E. Administration of the Bankrupt Estate of Can Corp

28. Robert W. Powell, ("Powell") a chartered accountant and Senior Manager in the Financial & Special Services Group of the Ottawa office of Deloitte & Touche, was responsible for the day to day administration of the bankrupt estate of Can Corp.
29. The role of Deloitte & Touche as trustee in bankruptcy of Can Corp was to obtain the maximum value from the assets, tangible and intangible of Can Corp and to distribute the assets to Can Corp's creditors including the mortgage investors.
30. On January 23, 1991, Deloitte & Touche gave notice of the first meeting of creditors which was to be held on February 1,

1991. The statement of affairs related to Can Corp disclosed that:

- a. Can Corp's total liabilities were approximately \$10.7 million;
- b. Can Corp's total assets were approximately \$6.4 million;
- c. Can Corp's liabilities exceeded its assets by approximately \$4.2 million;
- d. Of approximately \$8.4 million due to unsecured creditors, \$8.3 million was owed to investors in mortgages through Can Corp; and
- e. The total face amount of mortgages evidencing indebtedness to Can Corp was approximately \$10.3 million whereas potential realization from the properties underlying the mortgages was approximately \$6 million.

31. Deloitte & Touche reviewed its Preliminary Report (the "Report") at the first meeting of creditors. The Report disclosed that Blake and his staff had worked under the direction of Deloitte & Touche and were instrumental in preparing the analysis and information in the Report.

32. At the time of the Preliminary Report the estimated recovery for mortgage investors was approximately 68 percent of the total monies invested.

33. Several further meetings were held with an investor's committee and the inspectors in the bankruptcy of Can Corp. In accordance with the wishes of a majority of the investors, a motion was brought by Deloitte & Touche to the Court in which it recommended that all the mortgage proceeds collected

by Deloitte & Touche be shared pro rata by the mortgage investors in proportion to their investment.

34. On June 21, 1991, Mr. Justice Chadwick of the Ontario Court (General Division) in Bankruptcy, decided that all mortgages should be pooled for the purpose of distribution to investors. The application of three investors for a specific allocation of a particular mortgage to them was dismissed.
35. At a meeting of the investors' committee and inspectors in Can Corp held on August 20, 1991, Deloitte & Touche advised that the Ministry would not extend the mortgage brokers registration of Can Corp beyond August 31, 1991, and therefore, Can Corp's operations would be terminated at that time.
36. At a meeting of inspectors' and the investors committee held on September 3, 1991, Deloitte & Touche asked the investors and inspectors, at the request of Blake, if they would provide Blake with a letter stating that the committee had no objection to Blake obtaining registration as a mortgage broker in his personal capacity. The inspectors and investors committee members unanimously agreed that such a letter could not be provided.

F. Forensic Accounting Investigation into the Activities of Can Corp

(1) Background

37. Bruce Armstrong, ("Armstrong") B.A., C.A., a chartered accountant with extensive experience in forensic accounting, was involved in the Ministry of Financial Institutions investigation into the affairs of Can Corp. He directed the forensic accounting team ("Team") which included Heidi Akhtar and Henry Padwick, investigative accountants. Armstrong

reported to W.R. Pat Lymburner, Supervisor of Special Projects Team, Investigations Branch at the Ministry.

38. Armstrong has qualified as an expert witness and given evidence at all Ontario court levels on more than 35 separate occasions. He has appeared as an expert witness before the Professional Discipline Committees of both the Law Society of Upper Canada and the Institute of Chartered Accounts of Ontario.
39. The Team commenced its investigation in the spring of 1991. The purpose of the team's review was to assist the Ottawa police department with its criminal investigation which was focusing on the allegations of Can Corp against McKee and Khoozani in relation to the Khoozani mortgages.
40. The work of the Team included:
 - a. reviewing all material in the possession of the Ottawa City Police;
 - b. attending at the former offices of Can Corp on many occasions in order to interview staff, review relevant books and records and liaise with the trustee in bankruptcy, Deloitte & Touche;
 - c. identifying and analyzing all known mortgages and other investments that were entered into between Khoozani and or companies controlled by him, Can Corp and the investors in Can Corp;
 - d. Identifying and analyzing all known mortgage investments that were entered into between borrowers through Can Corp and McKee and/or McKee Financial Services Limited (McKee), as investors;

- e. Attending meetings and reviewing documentation in the possession of Peat Marwick Thorne (auditor) Coopers & Lybrand (former monitor) and Deloitte & Touche;
- f. Carrying out a detailed accounting examination and developing a comprehensive summary of findings supported by a number of accounting schedules.

DATED AT Ottawa this, 14 DAY OF December, 1992

Yegendorf, Brazeau

Legal Services Branch
Ministry of Financial Institutions

Per Howard Yegendorf

Per Gretchen Timmins

"

The Registrar proposes to refuse registration to Blake as a mortgage broker pursuant to Section 5(1)(a) and 5(1)(b) of the Mortgage Brokers Act ("the Act"), R.S.O. 1990, Chapter M.39, which state:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

Counsel for the Registrar presented five volumes of documents to support the allegations made against Blake (Exhibits 23 to 27). She set out in her opening statement (Exhibit 28), the summary of the allegations against Blake to be:

Section 5(1)(b) - Honesty and Integrity

1. Mr. Blake failed to disclose in his application for registration that he was previously registered as a mortgage broker and that his registration was suspended by reason of his financial responsibility.
2. In the applications for registration of Can Corp as a mortgage broker, Mr. Blake failed to disclose his two personal bankruptcies, one in 1970 and one in 1980.
3. The Registrar further alleges that Mr. Blake will not carry on business in accordance with the law and with honesty and integrity by reason of his conduct in managing Cancorp and causing it or permitting it to engage in the following activities:
 - a. selling guaranteed mortgage investments contrary to the Ontario Securities Act;
 - b. failing to advise investors when mortgages when into default;
 - c. continuing payments to investors in defaulted mortgages;
 - d. selling interests in mortgages where:
 - (i) investors funds were accepted for terms which extended beyond the term of the mortgage;

- (ii) an undertaking was given to pay a stated rate of interest for such investments;

while not complying with the prospectus and registration requirements of the Ontario Securities Act;

- e. having investors deposit money without knowing which mortgage they were investing in, paying interest to investors from the time of deposit of investor money, issuing post-dated cheques for such interest, while not being an adviser under the Ontario Securities Act;
- f. approving mortgages to one Massoud Khoozani;
- g. continuing to fund Khoozani mortgages and to make new mortgage loans to Khoozani even after the mortgages went into default;
- h. continuing to have persons invest in Khoozani mortgages after default;
- i. failing to advise investors as to the status of their mortgage investments;
- j. placing investor funds in Khoozani mortgages without prior approval and without advising as to the status of the mortgage and that other Khoozani mortgages in arrears;
- k. refinancing Khoozani mortgages without advising investors that the mortgage in default; and
- l. securing Khoozani loans by promissory notes although investors advised they had an interest in a mortgage;

Section 5(1)(a) - FINANCIAL IRRESPONSIBILITY

The Registrar alleges that Mr. Blake cannot be expected to be financially responsible in the conduct of his business by reason of:

1. His own personal bankruptcies; and
2. The bankruptcy of Can Corp of which he was president.

William Vasiliou ("Vasiliou") is the Registrar of Mortgage Brokers in Ontario and he confirmed paragraphs 1 to 8 of the Agreed Statement of Facts above. He referred to the Application of renewal of registration for Can Corp dated June 7, 1989 (Exhibit 23, p.2-7), and stated that both Blake and McKee were considered applicants along with Can Corp so that all necessary information was required from them personally in answer to the various questions on the form.

He noted that question 5 concerning bankruptcy was answered 'No', and that if Blake's bankruptcies of 1970 and 1980 had been mentioned, an investigation would have led likely to a proposal to refuse to register him. He then referred to the same question on the application of June 26, 1990 (Exhibit 23, pp.10-13) where question 5 was again answered 'No'.

He said that on Blake's personal application of August 23, 1991 which is the subject of this appeal, the answer to question 5 was 'Yes', but no particulars were provided (Exhibit 23, p.23). Upon review of the contents of the three Proposal documents, Vasiliou said that his concern was threefold. First, Blake was less than honest in not disclosing details of his own two bankruptcies of 1970 and 1980. Secondly, Blake was involved in the Can Corp demise as the "controlling mind" of that business and

significant consumer losses occurred. Thirdly, that trust funds in Can Corp were wrongfully used, for which Blake as President was responsible ultimately.

On cross-examination, Vasiliou said that since Blake was the President of Can Corp and ran the business, he knew or ought to have known what was occurring and that in his opinion, Blake knew about the various Khoozani mortgages upon which the whole brokerage foundered with the loss to investors of millions of dollars. Vasiliou said that he was not aware of McKee having equal authority with Blake, and that there was no evidence that McKee had any separate authority to act without Blake's awareness. He agreed that Blake assisted and co-operated fully when investigations occurred into the possible criminal activities of McKee and Khoozani. While he believed that these investigations were completed in late 1991, he is not aware of the laying of any criminal charges concerning Can Corp activities.

Vasiliou denied that the decision was made to refuse registration to Blake before the criminal investigation was completed and said that three or four months can go by where bankruptcy is being investigated although he agreed that bankruptcy was not referred to in the first Proposal of September 16, 1992. He said that when the details of the bankruptcy were known, they were included in the further two Notices.

Vasiliou confirmed that Blake had been registered personally in the late 1970's and that his application of February 26, 1976 (Exhibit 33) referred to his earlier registration as Drayton Investments Limited and that he went into personal bankruptcy in 1970 and was discharged in May 1972. Vasiliou also agreed that a credit report (Exhibit 34) showed three enquiries from the Registrar's office and set out as public record's information the two personal bankruptcies. Vasiliou agreed that

Blake's annual return of June 6, 1976 (Exhibit 35) mentioned "Discharged Bankrupt - Previously disclosed", and that the renewal form of June 7, 1977 (Exhibit 36) has the bankruptcy reference marked "see note below" with the 'No' box checked and a question mark and an asterisk beside the reference to listing offences which have occurred since the date of the last filing. He agreed that Blake's registration had been terminated on August 13, 1979 when a renewal was not sought (Exhibit 37).

Vasiliou agreed that Blake's application of October 24, 1979 to become a motor vehicle salesman showed a reference to the 1970 bankruptcy and that his 1978 mortgage broker renewal answered 'No' to the bankruptcy question.

Concerning the Can Corp application of June 7, 1989, Vasiliou said that he had not seen earlier a handwritten letter from Blake to Mr. Arthur Halpert, an earlier Registrar which disclosed the two bankruptcies and referred to Blake's alcohol problems of the 1970's. Vasiliou said that he sees Blake's actions and responsibilities in the demise of Can Corp to be breaches of both subsections of Section 5 cited earlier. The commitment to pay the guarantees to investors is of great concern to Vasiliou.

In referring to the undertaking of July 12, 1990 (Exhibit 22, para.16), Vasiliou said that the negotiations were conducted over several months and that infractions were referred to in Mr. Halpert's letter of June 30, 1989 (Exhibit 23, pp.99-100).

Robert Marrs ("Marrs") is an Ontario civil servant since 1980 and became the Deputy Registrar of Mortgage Brokers in January 1990 for a two-year term. He is familiar with the Can Corp and Blake files and noted that a review of a problem group of Ottawa-area mortgage brokers developed after the major Coulter collapse in July 1989. He met with Blake on six occasions and spoke with him

often during the preparation of the undertaking of July 12, 1990, while Marrs was the acting Registrar.

Marrs confirmed the facts in paragraphs 11 and 12 of Exhibit 22, and said that the knowledge of a thousand investors who lost funds in the Coulter collapse and the issue of guarantees being given from a corporation with limited resources were the reasons for this investigation. He did not recall seeing any handwritten letter to Arthur Halpert from Blake.

Marrs said that a mortgage broker giving a guarantee is becoming involved with the Securities Act and that such a broker is not acting appropriately as a middleman between borrower and lender. Since the assets of any mortgage broker are limited, he said that investors may be at risk if they rely on the broker and not on the value of a property or the repayment as agreed. He said that while renewals were not to be guaranteed after September 1989 (Exhibit 2, para.16), there were some such renewals. Marrs said that there was no confusion as to no new guarantees and no extension of renewal of any others without the Registrar's prior consent.

Marrs explained his view that the result of the investor's meeting of October 22, 1990, would be to continue with Can Corp since mortgages were registered, there was no bank debt and there was financial equity in the business. However, bankruptcy resulted (Exhibit 22, paras. 20-21)

On cross-examination, Marrs agreed that the issue of guarantees for investors' funds only came to great prominence after the Coulter failure. He said that while this practice was not specifically barred under the Mortgage Brokers Act, it was not expected to occur.

Heidi Akhtar ("Akhtar") is a member of the Investigation team whose work is referred to in paragraphs 37 and 39 of Exhibit 22. She said that her task was to seek out any breaches of the Act and to ascertain the reasons for the failure of Can Corp. She was seeking information about any possible preference given to McKee for payments of his funds advanced and for higher interest rates than those paid to other investors.

Akhtar referred to six examples (Exhibit 23, pp.143-148) where McKee received 24% on his share of funds in a mortgage while the interest rate received by Can Corp varied from 15½% to 18%. In her opinion, this was a wrong situation because Can Corp would lose on the arrangement. She said that funds to cover this differential must come from Can Corp's earnings or capital otherwise the investors were at risk for prospective losses. She said that Can Corp could have borrowed funds at lower current rates rather than pay McKee such a rate as 24%. In addition, investors had funds placed into various mortgages which were in default when renewed (Exhibit 23, pp.151-157). These persons lost their investments in the Can Corp bankruptcy.

On cross-examination, she agreed that the team had full access to all books and records at the Can Corp premises, and that Blake was very co-operative while he continued to run Can Corp under the direction of the monitor. On being asked if McKee's high interest rate was on unguaranteed funds needed to make up a mortgage balance as bridge financing so that early repayment would benefit Can Corp, Akhtar said that Can Corp could borrow at much lower rates if an amount was needed to make up such a balance. On being asked if Can Corp's fee of more than 10% would lead to a lower fund advance and a higher effective interest rate on the funds paid out, Akhtar said that a possible yield would be greater than the 24% paid to McKee and that such a transaction would be profitable.

Akhtar agreed that Can Corp was a "lender of last resort" so that borrowers would have to pay top interest rates. She said that Can Corp could borrow at lower rates if assets were pledged or if shareholders would guarantee any bank loans. She was not aware that Can Corp had no assets and that the shareholders would not allow any borrowing from a bank.

Bruce Armstrong ("Armstrong") is a chartered-accountant whose qualifications are set out in paragraphs 37 and 38 of Exhibit 22 above. A summary of the findings of his investigation team appears in Exhibit 26 at Tab O. He noted the comment that "The purpose of our review was to assist the Investigating Officers in their determination of whether their (sic) were sufficient grounds to proceed with a criminal prosecution." He reviewed the work of the team (Exhibit 22, para. 40 a. to f.), and particularly the details of the Khoozani mortgages which appear on the Notice of Proposal (Exhibit 19) as follows:

14. In January 1988 Cancorp arranged an investor mortgage in the amount of \$60,000.00 to 149819 Canada Inc., a corporation controlled by Massoud Khoozani ("Khoozani") on a property in Quebec known as "Val des Monts". This mortgage was initially approved by the Applicant.
15. In the following 23 months ending November of 1989 Cancorp arranged 23 investor mortgages on various properties which were controlled by Khoozani, all of which were funded with the full knowledge of the Applicant.
16. In August 1988, Khoozani fell into arrears on his payments on investor mortgages. As a result, Cancorp was required to continue to make payments to the investors under the Cancorp guarantees.

17. After this time, although the outstanding loans secured on properties controlled by Khoozani were for the most part in default, Cancorp arranged a substantial number of additional investor mortgages on Khoozani controlled mortgages. No interest payments were made by Khoozani on these loans, even though the mortgage documents indicated that payments were to be made on regular basis. Cancorp made interest payments to investors under its corporate guarantee although no payments were received from the borrower.
18. The investor mortgages arranged by Cancorp on Khoozani controlled properties and certain investor loans to Khoozani which were secured only by promissory notes are summarized below:

<u>DATE</u>	<u>PROPERTY</u>	<u>MORTGAGE</u>	<u>AMOUNT</u>
January 1988	Val des Monts	Mortgage (1st)	\$ 60,000
June 1988	Val des Monts	Mortgage (2nd)	17,000
June 1988	Lac Bourgeois	Mortgage (2nd)	35,500
July 1988	703-705 Edison	Mortgage (1st)	\$200,000
July 1988	Lac Barbeau	Mortgage (1st)	350,000
July 1988	South Gower (1)	Mortgage (1st)	30,000
July 1988	South Gower (2)	Mortgage (1st)	108,710
August 1988	1142-1144 Carling	Mortgage (1st)	1,050,000

September 1988	Promissory Note		33,200
September 1988	Promissory Note		20,000
October 1988	1216 W.8th Ave.BC	Mortgage (1st)	83,486.77
October 1988	Promissory Note		53,000
October 1988	1134 Byron St.	Mortgage (2nd)	23,300
October 1988	249 Nepean	Mortgage (2nd)	27,000
November 1988	20 Potter St.	Mortgage (2nd)	28,500
November 1988	1134 Byron St.	Bridge loan	33,000
December 1988	337-339 Cyr St.	Mortgage (1st)	12,000
December 1988	48 Main-8 John St.	Mortgage (1st)	275,000
January 1989	703 Edison	Promissory Note	15,250
January 1989	632-634 Edison	Mortgage (1st)	330,000
March 1989	49 Main-8 John St.	Mortgage (1st) New	850,000
May 1989	8411 #3 Rd. BC	Mortgage (1st)	220,000
May 1989	1142-1144 Carling	Mortgage (2nd)	<u>390,000</u>
TOTAL LOANS			\$4,244,946.77

19. At the time the last mortgage being the second mortgage on 1142-1144 Carling in the amount of \$390,000.00, was advanced, almost all the outstanding investor mortgages secured by Khoozani controlled properties were in default.
20. In many instances the investor's funds were placed in Khoozani mortgages by McKee and the Applicant without the prior approval of the investor. This would often occur when the participation of an investor in an unrelated mortgage was paid out and the funds were received by Cancorp in trust. Rather than consult the investor or return the funds to the investor, McKee or the Applicant would authorize the advance of the funds to a Khoozani mortgage and then notify the investor by letter of the investor's new investment. The investors were not advised of the status of the mortgage in which the investor's funds had been placed and that other Khoozani mortgages were in arrears.
21. Investor funds were used to refinance Khoozani mortgages at a time when the mortgage was in default without the consent of the investor and without the investor being notified of the status of the mortgage.
22. As noted above in paragraph 18, three investors loans to Khoozani were secured only by promissory notes although the investors were advised that they had an interest in a mortgage. These promissory notes were issued at a time when Khoozani was already seriously in default on his mortgage portfolio.

Armstrong set out his summary of findings to be (Exhibit 26, Tab O at p.3):

In my opinion, John McKee breached his fiduciary responsibilities to both Can Corp and the syndicated investors, at no risk of loss to himself and enjoyed significant financial remuneration as a consequence. In my opinion, the syndicated investors were placed at considerable risk in order to facilitate the cash flow requirements of Can Corp. For the most part, these investors ultimately incurred heavy losses. Victor Blake, the president, and McKee, co-signed virtually all cheques issued by Can Corp. Further, Blake and McKee received identical commissions from each and every financial transaction entered into by the company. These opinions can be demonstrated through a number of specific findings as set out and summarized in the remaining sections of this memo.

He stated that in May 1989, \$100,000 of a mortgage advance was retained to pay up interest owing on four loans and to pay out three loans while partially paying out a fourth. This showed to him that Khoozani was not paying and that the principal advanced from other investors was being used to pay interest obligations of Khoozani. (Exhibit 26, Tab O, p.4)

He said that John McKee had all of his short-term "bridge financing" investments returned while other investors lost their funds. Finally, he said that his review of compensation income for

both Blake and McKee showed identical commission amounts of \$307,700 in 1989 and \$202,665 in 1988, while their salaries had a variance.

On cross-examination, Armstrong said that he had reviewed hundreds of cheques and that those he saw for the Khoozani transactions were signed both by Blake and by McKee. He agreed that Blake did not take any trust funds for himself and that McKee left the Can Corp business on June 30, 1990. He agreed that thereafter Blake was in charge of the business and said that Blake was co-operative and assisted Armstrong's team.

Robert Wade Powell ("Powell") is a chartered accountant and Senior Manager with Deloitte and Touche, and he confirmed the information set out in paragraphs 28 to 36 of Exhibit 22 above. He said that Can Corp's records and books were in "pretty good shape" although some postings of items were outstanding and the administrative records were not as good. In his preliminary report, he classified the investments based on four types of renewals with or without guarantees and on four types of transfers into current or defaulted mortgages. He concluded that some 25% of investor's funds were guaranteed after October 1989 while some 27% were placed into defaulted mortgages. He referred to the Decision of Mr. Justice Chadwick in the bankruptcy of Can Corp (Exhibit 24, Tab I at p.20) who stated:

Can Corp did not segregate the interest paid on the mortgages but pooled all of the interest in one account and also mixed funds from their general account in order to meet their monthly commitments.

I am satisfied on these facts that the investor funds were treated more as a deposit than a true trust arrangement.

Powell said that as Trustee in Bankruptcy, claims were filed for Can Corp against Khoozani's bankrupt state for \$806,968.90 in liquidated claims and \$1,322,601.86 in unliquidated claims (Exhibit 26, Tab M). Powell's firm is also the Trustee in Bankruptcy for both Khoozani and for Khoozani's company and no recovery of any of the Can Corp claims will occur. Powell believes that the Can Corp investors may recover one-eighth of their claims.

On cross-examination, Powell said that information as to Armstrong's team investigation was requested twice in writing from the Registrar, but none was received. He also said the issue of consent by investors on transfers was not important when business was active and high interest was paid with postdated cheques. The complaints by investors were all after the bankruptcy, when perfection in documents and procedures became of great interest. In Powell's view, many of the investors were sophisticated and had legal advice readily available to them. Most investors wanted Can Corp to continue with Blake in charge in order to eventually work out the mortgages and be repaid, he said, but the bankruptcy petition stopped that.

Massoud Khoozani ("Khoozani") confirmed the facts in Paragraphs 22, 23 and 24 of Exhibit 22 above. He said that Blake introduced McKee to him and McKee was the contact through whom he would work his projects. There were some 23 loans and after McKee would inspect the location, Khoozani said he would negotiate with McKee and Blake or at least the project would be "run by" Blake by McKee. Khoozani said both had to approve each project, they had equal power to approve loans and used adjoining offices.

Khoozani said these loans were all to be developmental so that after purchase of a site and obtaining a permit, Khoozani would build, sell and then pay off the loan while construction draws would bring current any outstanding interest arrears. Khoozani said that when the Campanale family wanted interest paid and not deducted from advances, the whole situation collapsed when market prices fell and defaults occurred.

Khoozani said that Blake was fully aware of the details of the various loan transactions.

Eamon Grattan ("Grattan") is a self-employed accountant who did general duties and banking at Can Corp. He said that Khoozani came into the offices and met with McKee and Blake, but he did not know the status of the Khoozani loans. Grattan said that he was fired on August 29, 1990, by Blake because of transfer of funds from trust some three months earlier so as to ensure that an office cheque would clear. Grattan acknowledged his lengthy criminal record and many jail terms from 1969 to 1982, and said that he first met Blake when they attended an Alcoholics Anonymous meeting together, after which Blake hired him the next day.

Richard Morgan ("Morgan") is a mortgage consultant who confirmed the facts in paragraphs 25, 26 and 27 of Exhibit 22 above. He said that he prepared status reports on defaulted mortgages on McKee's instructions and thought Blake would know of his duties as Blake was President of Can Corp. The Khoozani loans were 75% of his problems and he said that McKee and Blake were equal and that both had responsibility in making transfers of investors.

Douglas Cherry ("Cherry") was the first witness on behalf of Blake. Cherry has had a career of 22 years with the Bank of Montreal followed by 22 years with Municipal Financial Corporation

and he retired on October 31, 1992. This Corporation covers Central and Eastern Ontario through 23 branches with 500 employees and has \$1.3 billion in assets. He has known Blake for some seven years and gave Blake authority to approve loans of up to \$350,000 as an agent. He knew that Blake had been an alcoholic and had two bankruptcies; and he was well satisfied with the \$175,000,000 of business which Blake did with the Corporation. He believes Blake to be honest and to have integrity and would do business with him as his competence led to a loss ratio of less than 1%.

On cross-examination, he said that he visited with Blake every three months and spoke with him daily and he agreed that much of the operation of Can Corp went on without his personal knowledge. He agreed that Blake would bear the brunt of problems in a bankruptcy since he had the title and the responsibility as President of Can Corp. He agreed that any fraud on the part of McKee would not be Blake's burden and that the loss ratio for other loan corporations was 5% while Municipal had a 6% ratio in late 1991. The average in a good year might be 3%, Cherry said.

Don Nicholson ("Nicholson") is a real estate appraiser in Ottawa and has known Blake since 1988. He too is a recovering alcoholic and worked with Blake who is active in counselling and encouraging others. He has done appraisal work for Can Corp and for Municipal Trust in the Ottawa area. He said that any clients he referred to Can Corp were well treated and that Blake developed a policy of a "reliance letter on value" which many others now use. On cross-examination, he agreed that he did not know the internal business practices and procedures of Can Corp.

Dr. Danielle Perrault ("Perrault") is the Director of a clinical program in Ottawa and spoke of the assistance given by Blake to obtain an office location in 1990. Perrault is a specialist in cancer detection and treatment as well as a professor

at the local medical school. She found Blake to be very professional in his advice and dealings with her. She said that Blake is also working with her husband who is developing 64 townhouses in Hull and that Blake kept the project going through a financial crisis in January 1992. She said she would use Blake as a mortgage broker and believes him to be honest.

Murray Victor Blake ("Blake"), 48, stated that he had sent a handwritten letter to the then Registrar of Mortgage Brokers when the officers and directors of Can Corp changed and therein he explained his two bankruptcies of 1970 and 1980 which occurred because of his alcoholism. Therefore, he said he did not answer "Yes" on the various renewal forms. Unfortunately, that letter is not in the Registrar's file and he has been unable to find a copy in the Can Corp records after an extensive search. He said that the 1970 bankruptcy had been disclosed years ago and the Registrar is fully aware of it (Exhibits 33, 35, 36 and 39).

When he was 23, the mortgage broker licence of Drayton Investments Limited was revoked. He was President and Director of that Corporation whose founder left one night, leaving Blake with the situation he said. Blake had taken on the personal guarantee of certain mortgage investments, and went into personal bankruptcy in December 1970. He became involved with a mortgage broker in Ottawa in 1971, and instant success saw the business grow to 23 branches in four years with many investors to a \$40,000,000 business. Blake said that he had been promised shares in the Corporation, but the business was sold and after a lawsuit he became a severe alcoholic. Blake said that he took medical help and since April 23, 1979, has not had an alcoholic drink.

Blake has been very active in Alcoholics Anonymous at seminars and meetings, and he counsels others to help them at least

once a week. He also did volunteer work as a minor hockey coach and Association Director.

From 1979 through to 1984, Blake worked as a pizza flyer delivery man, a parking lot attendant and then as a very successful furniture salesman; as he built himself up. He joined Can Corp in February 1985 in the formative months, and after he was hired he cleaned up losses from the original manager and made a profit and began to build a staff. McKee came into the business in August 1985 on the direction of the shareholders of Urbotech, the controlling Corporation. Three members of the Campanale family, three others and McKee were the seven shareholders in Urbotech. Blake said that McKee learned quickly and worked well, and that his loyalty was to the Campanale family.

While Blake was President with "his face on the buses" and advertising, he had equal authority with McKee who did the staff administration and paid the bills. Blake trained employees and developed the business. As Can Corp grew, revenues gave direct money to invest for the company and then management of mortgages for other persons began.

Blake said that the Campanale family did not allow Can Corp to borrow money or have an investment line-of-credit at a bank. Also they would not give any personal guarantees for Can Corp's activities. The Urbotech shareholders took turns in reviewing investment files and Blake moved from a one year contract to a five-year arrangement. Blake said that he sought to entrench his own interests when McKee arrived by agreeing to combine commissions and divide them equally since McKee had no prospect of generating lucrative projects. Blake said this was done to protect his own future even though he created 85 to 90% of the total commission funds available.

Blake said that he developed a mortgage management plan wherein investors brought in funds which were placed as needed into mortgage accounts and moved to new mortgages on the payout of earlier ones. The Can Corp guarantee became a part of this practice to cover any shortfall from a defaulted mortgage so that investors were protected.

In this way, Can Corp's mortgages were then pieced off to later investors; and the plan was that no investor could therefore ever lose any funds. Blake said that other mortgage brokers in the Ottawa area followed the same practice.

As to the claim of preferential treatment being given to McKee, Blake said that often a "bridging" amount would be needed for a short term to make up the exact balance of a mortgage account. McKee would provide funds at the 24% interest rate and be repaid when other investors were found to take up his portion. In that way, a 16% interest payment on a mortgage by a borrower would likely be more than enough to cover the variety of portions from investors who would receive lower rates even if McKee was in the investment briefly. In the result, all loan commitments could be met with funds on hand to cover a project, Blake said.

Blake said that the letter from Arthur Halpert of June 30, 1989 (Exhibit 23, Tab D) raised only three minor points after the examination of Can Corp by Hubert Arcand. In his view, the matter of the guarantees of investments was known by Arcand, but not commented upon as an issue. Blake said that Arcand called from the Coulter office on August 1 when that empire was collapsing to warn Blake not to give any more guarantees. Blake looked on Halpert's letter as an endorsement of his five years of work to build Can Corp, he said.

Blake said that while the posting of various transfers among mortgages might be delayed, there were always funds in trust to cover the payout of investments which came due.

For the Khoozani loans, Blake reviewed the list and said that he was aware only of three files: the Val des Monts loan in January 1988, the Carling loan in August 1988 and the loan on Khoozani's own residence in November 1988. In each other file, Blake said that he was never aware or does not recall any involvement in approving, making a financial commitment or funding those loans.

Blake said that he reviewed the Val des Monts loan file after McKee left Can Corp and found that Khoozani did not own the property, but would buy it and renovate so that McKee had misled Blake by approving the loan. Blake said that if McKee had been honest in that first Khoozani loan, and followed the proper steps for commitment and funding, the future development would not have occurred and Can Corp would not have been destroyed.

Blake said that he became aware of the faults in the Khoozani mortgages in October 1989, and that he thought that there had been a "fail safe" system in place with postdated cheques on hand to warn of delinquency. He denied that frequent meetings with Khoozani had occurred. He agreed that the Ottawa scene was frenetic with Can Corp growing from \$9,000,000 to \$27,000,000 in mortgage business to become second to the Coulter operation. He said that Municipal Finance had high standards for loans, and that he had authority to approve loans of up to \$350,000 with telephone approval needed for those up to \$750,000. He achieved \$50,000,000 of the \$70,000,000 target of Municipal Finance loans as Ottawa mortgage brokers accounted for 20% of the one billion dollar total business in Ontario at that time.

Blake issued a memo on February 26, 1990 (Exhibit 50) to state that all documents sent "to the Investor clients must be stamped with "Not Guaranteed - Not insured"". New business forms and reports were put into action by Tony Campanale on March 20, 1990 (Exhibit 51) for new money and renewals while existing files used up the old forms.

Blake recalled the meeting on October 5, 1989 at the Registrar's office in Toronto where he and McKee met with staff and accountants and where Can Corp operations were discussed. There was particular interest in the guarantee issue, and agreement was reached that there would be no new guarantees to avoid any panic of dealing with investors already in place. Blake said that investors were informed by letter on December 6, 1989, that no corporate guarantees would be give on all new investments or on renewals (Exhibit 53).

Blake said that he was not aware of any investors being transferred from one to another mortgage without their consent. After the bankruptcy, Blake concluded that Can Corp would be operating today even through several recessionary years if it had not been for the Khoozani loans which McKee supervised.

Blake said that the Can Corp guarantee was a business practice which would induce some to invest who would rely on this, while other knowing persons would realize that such a guarantee was only as good as Can Corp's resources. Blake agreed that more stress should have been placed on the risk in any investment and that he wishes he could have done more at the time since this was his ultimate responsibility. While the owners of Urbotech would not give any personal guarantees for Can Corp and would not, therefore, allow Can Corp to borrow, there was a cash flow for Can Corp which could lead to having investments of its' own capital as business developed, said Blake.

Blake said that no one ever looked at Can Corp's books before investing so as to learn the worth of the corporate guarantee. Blake agreed that the audited financial statements of September 30, 1988 (Exhibit 23, Tab C, p.41) showed deferred revenue, shareholder's equity and retained earnings to total about \$800,000 which was the total available for all guarantees if the total mortgage accounts of \$9,000,000 all collapsed.

Blake said that he knew of many of the Khoozani transactions at the application stage, of several at the commitment stage and of none at the funding stage. He agreed that he had signed certain mortgage instructions (Exhibit 26, Tab L6, p.14) and many of the cheques and that he had the opportunity to know about all these transactions. He said that for more than a year, no staff members told him of any N.S.F. cheques and defaulted mortgages. Blake agreed that many of the 43 continuations of Can Corp guarantees after October 1989 breached the spirit of the undertaking given to the Registrar.

On the 1986 renewal application for Can Corp's registration, Blake noted that the question for bankruptcy was answered 'Yes' with the note "Victor Blake see file" and this is in McKee's printing.

In conclusion, counsel for the Registrar said that consideration had been given to Blake's conduct as President of Can Corp, to the contents of the various registration applications made by him over the years, to the circumstances of his own two bankruptcies and to the details of the bankruptcy of Can Corp. She said that the Registrar has concluded that Blake should not be registered as Section 5(1)(b) allows such a result where "the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty." She said that the direction given in the

1983 Brenner decision of the Divisional Court reported in 19 CRAT 58 to the Tribunal is as follows:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

Counsel reviewed the business practices of Can Corp and the conclusions reached by Armstrong in his evidence. She noted that the practice of issuing guarantees to investors was a primary cause of the financial demise of Can Corp. She said that Can Corp and Blake both acted dishonestly in not informing investors of the limitations of Can Corp's guarantee based on its own financial resources.

She said that Blake was President of Can Corp and had a responsibility which he cannot avoid by saying that McKee had equal authority and that McKee processed all the Khoozani loans. She noted that Blake had signed the cheques for mortgage advances and that Khoozani's evidence was that Blake knew the details of each loan.

For her a further issue is whether Blake knowingly breached a verbal agreement in October 1989 by continuing to give guarantees to renewed investors. She concluded that Can Corp continued to give guarantees and place investors in defaulted mortgages and that Can Corp misled the Registrar by not referring

to a significant number of transactions that violated the Ministry direction.

Counsel admitted that Blake's 1970 personal bankruptcy was disclosed in his 1976 application for registration. It also appeared that information was provided in Can Corp's original application. She agreed that Blake had disclosed both the 1970 and 1980 bankruptcies in the present application which is the subject of this appeal.

Counsel said that Blake generally in his answers to questions on documents was never wholly correct and honest and that his incomplete responses have led to misleading of the Registrar. She commented that no investors were called upon to support either Blake's claim of broad support for his continuation of Can Corp or his present application for registration.

As to financial responsibility and the exception of Section 5(1)(a) as to financial position, counsel noted Blake's two personal bankruptcies and that of Can Corp for which he as President must bear a major responsibility.

Counsel for Blake said that the Registrar has issued three Notices and developed seven issues upon which registration is denied, namely:

1. Blake's previous bankruptcies
2. The McKee/Khoozani transactions
3. The Can Corp Guarantee
4. The allegations of Eamon Grattan
5. Preferential treatment of John McKee
6. Over pledged mortgages
7. Transfers of Can Corp investments

The previous bankruptcies were known to the Registrar and could have been easily found in the file documents and Blake had no intention to deceive or mislead the Registrar, he said. For him the Khoozani mortgages were the major issue of concern, and he saw no evidence provided by Morgan, Armstrong, Powell or Marrs which prove Blake's knowledge and approval of these transactions.

For the Can Corp guarantees, he said that there was no default ever and that the Mortgage Broker Act did not then disallow such an activity. He rejected the evidence of Eamon Grattan as that of a disgruntled ex-employee fired for cause.

As to any preferential treatment of McKee's investments, counsel said that the explanation of short term bridge financing was reasonable and good business for Can Corp, although Akhtar had no knowledge of this procedure.

As to the over-pledged mortgages, he said that Blake denied any such practice but agreed that some delays in posting entries in the records did occur due to the volume of business being done. For the claim of transfers of investors without their consent from one mortgage to another, counsel said that no direct evidence was presented on this issue except by Blake and no investors were called to support the allegations of the Registrar.

Counsel concluded by stating that the Registrar was determined not to allow Blake to become a mortgage broker and had made that decision even before the application was received.

The Tribunal has considered the evidence of the witnesses in this hearing and the submissions made by counsel.

Following the direction given in the Brenner decision, I conclude in that double negative approach that I cannot say that

the Registrar does not have reasonable grounds to deny registration. The comments of Mr. Justice Chadwick and the conclusions of Armstrong both referred to earlier lead to the Registrar's conclusion that Blake was involved in the wrongdoing which occurred in the operations of Can Corp.

The Registrar has denied Blake's application after considering the evidence presented to him, and I cannot say that he was in error in reaching his conclusions.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Mortgage Brokers Act, R.S.O. 1990, Chapter M.39, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

JOHN APPELMAN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
JACINTH HERBERT, Vice-Chair as Member
J. TIM HOGAN, Member

APPEARANCES;

ROBERT CONWAY, representing the Registrar under the
Motor Vehicle Dealers and Salesmen Act

No one appearing for the Applicant

DATE OF

HEARING: 10 May 1993

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal requested by the Applicant following the issue by the Respondent on June 30, 1992 of a Proposal to refuse to grant him registration as a motor vehicle salesperson. As appears from Exhibit 2 herein, an affidavit of Nancy Hagans, a copy of the Appointment For and Notice of Hearing was sent by the Tribunal's office to the Applicant on January 22nd, 1993 by Purolator courier to his address at 19868 Old Yonge Street, Holland Landing, Ontario. The Applicant did not appear at the hearing. The Tribunal waited until after 10:00 o'clock in the forenoon to commence the hearing, the Appointment and Notice having stated that the same shall commence at 9:30 a.m. on this day Monday, May 20, 1993.

At the hearing, counsel for the Respondent filed as exhibits copies of the Proposal, the application of the Applicant for registration and of a letter which he sent with it to the Respondent.

Upon reading this documentation filed and upon hearing what was alleged by counsel aforesaid, the Tribunal pursuant to the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, directs the Registrar to carry out his Proposal.

DEAN CUDMORE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
SELWYN CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES;

DEAN CUDMORE, appearing on his own behalf

ROBERT CONWAY, representing the Registrar under the
Motor Vehicle Dealers and Salesmen Act

DATE OF

HEARING: 23 November 1992

Toronto

REASONS FOR DECISION AND ORDER

The appellant Dean Cudmore is an automobile dealer who had since 1976 to 1987 operated a used car sales known as "Cudmore's Auto Mart". In November 1988, his business was changed to the wholesale market only and his licence prohibited him selling to the retail market. He could, therefore, not sell to the public at large and his licence was accompanied by a statutory declaration which he swore to that effect.

The business address of Cudmore's Auto Mart was shown on the application for registration as 7710 Islington Avenue, Woodbridge and a Compliance Officer from the Ministry, one Ian Carry, attended there on January 14, 1992 to inspect the premises. Mr. Carry reported that:

7710 Islington Avenue, Woodbine is presently occupied by Best Buy Cars and Big Time Auto Service Ltd. (see attached business cards). Michael (Mike) Geller of Best Buy Cars (a registered motor vehicle dealer #273827 and Tony Garofolo of Big Time Auto Service Ltd. stated that Cudmore's Auto Mart is not there, that they never heard of Dean Cudmore!

Mike further stated that he had been at this location for over two and one-half years.

7675 Keele St., Toronto is a detached residence. There was no answer at the door.

There were three motor vehicles parked on the property. One on the north side (Olds Cutlass VIN #1G3NF51UXJM268793) had a "for sale" sign that also disclosed 738-5255, Pager: 246-4269...

On this date, there was no answer at 738-5255 that was disclosed on the "for sale" sign...

Mr. Carry in his evidence said that after attending at the ostensible business premises on Islington Avenue, he then went to 7675 Keele Street, Concord which was the residence address the appellant had stated in his application. The telephone number on the Oldsmobile vehicle advertised there for sale was that of the residence. He pointed out that the reason for the inspection was because of the department's attempts to identify the curbside dealers who sold cars from their residences. He noted in his report there were three vehicles apparently for sale at this premises and directed the department to conduct a search of registrations for evidence of Mr. Cudmore's retailing activities.

Since the appellant's application for renewal of October 17, 1990 disclosing his business address as 7710 Islington Avenue, no change of address had been received by the department until a further application for renewal on October 1, 1992 was received which bore 33 Newcastle Street, Etobicoke as the new business operation. This resulted in an interview on October 5, 1992 in which Cudmore advised Carry he had a new premises and admitted he had been retailing vehicles to the general public contrary to the Act on his undertaking, but was now willing to comply with the Act. Carry, however, attended at 33 Newcastle Street and found the premises were not occupied by Cudmore and no one there had ever heard of him.

His report (Exhibit 8, tab 4) confirms his evidence.

33 Newcastle, St., Etobicoke, is occupied by two businesses, namely: Maple & Palm Auto Body Shop (see attached card) and Maltan Auto Body. There were business signs for both these businesses; however, there were none for Cudmore's Auto Mart. There were no apparent motor vehicles displayed for sale. There are no physical separations for a lot (see diagram on the back).

No one at either business had heard of either Cudmore's Auto Mart or Dean Cudmore. (Including Don Malixi).

It is suggested that RINS and VINS be obtained to ascertain where this business sells their motor vehicles from.

He pointed out that Cudmore had an office and sign on it at 27 next door.

Robert Pierce, the Registrar however in his evidence said that all Cudmore had there was a desk in the middle of a storage area and the department has never been able to inspect Cudmore's business as required by the Act.

He observed that Cudmore was simply operating a curbside business from his house.

A department search of registrations disclosed at least five transactions in which Cudmore sold three to individuals as a retailer and two which were sold three times on the same day and ultimately that day to a person who was not a dealer.

Mr. Cudmore in his evidence attempted to explain the transactions and contended that he had an office at 7710 Islington Avenue until about eight months ago. He said he had a sign, but did not know what happened to it. He stated that he only sold to personal people and has sold six or seven cars that way. He did, however, admit that he sold at least five cars per month.

Although Mr. Cudmore attempted to explain the discrepancies in his operation, it is clear that he is and has been operating outside the scope of his licence. He is unquestionably a curbside dealer, one of the many operators the department has been attempting to close down. The Registrar is concerned primarily with the irresponsibility of these offenders against whom the public has had little or no recourse.

Despite his protestations to the contrary, we find as a fact that Cudmore has been dealing in automobiles in contravention of his statutory obligation and in contravention of Section 3(3) of the automobile dealers act.

Therefore, by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

JAMES KENNETH FOSTER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
SELWYN CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES;
JAMES KENNETH FOSTER, appearing on his own behalf
ROBERT CONWAY, representing the Registrar
of Motor Vehicle Dealers and Salesmen

DATE OF
HEARING: 23 November 1992 Toronto

REASONS FOR DECISION AND ORDER

In this matter, the Registrar has issued a Notice of Proposal to refuse the registration of the appellant on the grounds that:

In the Registrar's opinion, James Kenneth Foster is not entitled to registration under section 5 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Proposal continues:

IT IS ALLEGED AS FOLLOWS:

1. James Kenneth Foster ("Mr. Foster") applied for registration as a salesperson with Probart Mazda (Registration Number 1827650) on May 15, 1991.
2. Mr. Foster had previously been registered as a salesperson under the Act under Registration Number 2162770, but his registration had lapsed.
3. Mr. Foster answered "No" to Question 6 in the application form, which reads:

Have you ever been convicted for found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

4. Mr. Foster answered "No" to similar questions in applications for registration made on November 1, 1983, September 16, 1986, March 8, 1988 and February 19, 1990.
5. The Registrar's Office made enquiries with respect to Mr. Foster's criminal record as part of the review of his most recent application.
6. Those enquiries indicated that Mr. Foster has the following criminal convictions:
 - a) September 10, 1976 - 4 charges of theft over \$200 and 2 charges of theft under \$200;
 - b) May 17, 1978 - 1 charge of possession of a narcotic;
 - c) August 22, 1979 - 1 charge of possession of stolen property;
 - d) October 25, 1979 - 3 charges of theft under \$200 and 1 charge of possession of stolen property;
 - e) April 28, 1980 - 2 charges of break and enter with intent, 2 charges of theft over \$200, 1 charge of break and enter and theft, 1 charge of possession of stolen property, 4 charges of drive while disqualified, 4 charges of mislead a peace officer, 1 charge of breach probation, 1 charge of fail to appear;
 - f) August 8, 1980 - 1 charge of break and enter and theft, and 1 charge of unlawfully at large;
 - g) September 21, 1981 - recommitted for parole violation;

- h) November 23, 1981 - 1 charge of possession of stolen property and 1 charge of public mischief;
- i) April 15, 1982 - 1 charge of escape lawful custody;
- j) May 28, 1985 - 1 charge of drive with more than 80 mgs. of alcohol in blood, and 1 charge of fail to appear;
- k) January 9, 1989 - 1 charge of assault causing bodily harm;
- l) July 27, 1989 - 1 charge of fail to attend court, 1 charge fail to comply with recognizance, and 1 charge of drive with more than 80 mgs. of alcohol in blood; and
- m) January 7, 1991 - 1 charge of drive with more than 80 mgs. of alcohol in blood.

7. The Registrar is of the opinion that Mr. Foster is not entitled to registration because of the number of convictions, the seriousness of the convictions and his failure to disclose the convictions.

In a Notice of Further or Other Particulars, the Registrar alleges:

1. In addition to the criminal convictions listed in the Notice of Proposal to Revoke Registration dated September 17, 1991, Mr. Foster has the following criminal convictions:

January 7, 1991 - one charge of impaired driving and one charge of driving while disqualified.

In his opening statement (Exhibit 7), counsel for the Registrar submits the following allegations:

1. the Registrant furnished false information to the Registrar in 4 of his 5 applications for registration as a motor vehicle salesperson. By doing so, the Registrant contravene section

22(1)(a) of the Act. The false information consisted of statements that the Registrant had not been convicted of any offence; the Registrant suppressed 25 criminal convictions from 13 separate court appearances from 1976 to 1991. The Registrant suppressed his many criminal convictions because he expected that disclosure of them would result in refusal of his applications for registration;

2. the nature and magnitude of the Registrant's criminal record have also given the Registrar grounds to believe that the Registrant will not carry on business in accordance with law and with honesty and integrity.

14 of the above offences are based on acts of dishonesty. Most of them are theft related, but very significantly, 4 convictions stemmed from the Registrant's attempts to mislead a peace officer about his identity. 7 convictions are serious driving offenses - 3 for driving while over 80, and 4 for driving while disqualified. The Registrant is currently prohibited from driving for 3 years because of his 3rd conviction for driving while over 80.

.....

The seriousness of the Registrant's criminal record is underscored by the sentences imposed against him. The cumulative total of his prison sentences is 12 $\frac{1}{4}$ years. The Courts showed compassion towards the Registrant by making several of his sentences concurrent, so that the total imprisonment was compressed to 3 $\frac{1}{3}$ years.

This Tribunal finds as a fact that each of the allegations submitted by the Registrar have been corroborated by the evidence and not denied by the appellant.

Mr. Foster is 33 years of age, married and supports three children. After his last conviction for impaired driving on January 7, 1991, he said his wife brought the children to see him in jail. That experience he said changed his life and he has not had a drink since. He observed that he does not need the assistance of Alcoholics Anonymous since his wife and family offer all the support he needs. We trust his determination is sincere.

A series of letters, Exhibits 9 to 15, have been tendered in evidence by Foster, all of which bear significant recommendations and would appear to be corroborate his own statement that he never misled a customer in his life. Nevertheless, the employment record is not impressive. The Registrar has offered in evidence the Certificate of the Director of the Motor Vehicle Dealers Act which certifies the appellant has been engaged in the business since November 8, 1983. From that time he has been employed in 14 dealerships, with one for 4 days and another for some 10 days. His evidence is that in each case, he left voluntarily. It would appear, however, that he is an excellent salesman since he sold 130 automobiles in 1991 with his employer Probart Mazda.

This is one of these cases which so frequently come before this Tribunal where the appellant appears to have a record of employment almost without blemish and yet his tragic private life is so divorced from it, they run in parallel lines that can never meet. The appellant having failed to disclose his criminal record to the Registrar as required on four applications now asks us to disregard this omission because he did not think the disclosure was necessary. We cannot accept that as either a valid reason or a reasonable excuse. He places his honesty and integrity in issue by misleading the Registrar in order to gain registration and that is a reflection on how he may conduct business.

Having regard to judgment of the Divisional Court in the case of Brenner vs. the Registrar of Motor Vehicle Dealers and Salesmen, can we say the Registrar is wrong in his Proposal in this matter? The convictions are serious and the list is long. Can we in view of the appellant's submissions that he is a changed man consider sufficient time has elapsed to demonstrate his new determination. The case of Neil M. Kennedy (1989) 18 CRAT p.307 is not dissimilar although it involved an application under the Real Estate and Business Brokers Act. At page 315, the Tribunal said:

The second element concerns the convictions against the Applicant in 1983 and 1986. The crimes he committed were so serious, that it is incumbent upon the Applicant to prove his rehabilitation. The Tribunal does not believe that a sufficient period of rehabilitation has elapsed to establish that Kennedy will now conduct himself with honesty and integrity.

Also in the case of Stuart A. Montgomery (1988) 17 CRAT p.257 at p.258 it was held:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal had before it conduct of less than one year to override criminal conduct of sixteen years duration. This Tribunal finds that this is insufficient time for it to determine in the interest of the Ontario public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

It is always with the greatest reluctance that the Tribunal makes a decision against an appellant when it may affect either his future or his livelihood. The law, however, is clear and permits us only a limited latitude. We cannot find that the Registrar has erred in concluding the Applicant's past conduct disentitles him to registration.

By virtue of the authority vested in the Tribunal by section 7(4) of the Motor Vehicle Dealers Act, the Tribunal hereby directs the Registrar to carry out his Proposal

G.V.L. AUCTIONS INC. (L.V.G. AUCTIONS)
KENNETH A. LUND
JOHN VISCH
LARRY A. GARDINER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE REGISTRATION AND
TO REFUSE RENEWAL OF REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
THERESA M. WALSH, Vice-Chairman as Member
FRANK HARTWICK, Member

APPEARANCES:
MORRIS COOPER, representing the Applicants
ROBERT CONWAY, representing the Registrar under
the Motor Vehicle Dealers Act

DATES OF 9 November 1992
HEARING 2, 3 February 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by G.V.L. Auctions Inc., carrying on business as "LVG Auctions", registered under the Motor Vehicle Dealers Act (the "Act") as a motor vehicle dealer, and by Kenneth A. Lund, John Visch and Larry A. Gardiner, registered under the Act as motor vehicle salespersons, against the Proposal of the Registrar to revoke their registrations.

By Proposal dated May 6, 1992, the Registrar proposed to revoke the applicants' registrations on the ground that under section 5 of the Act:

1) Respecting G.V.L. Auctions,

a) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business; and

b) the past conduct of its officers and directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;

2) respecting Kenneth A. Lund, John Visch and Larry A. Gardiner, each of them respectively,

a) having regard to his financial position, he cannot reasonably be expected to be financially responsible in the conduct of his business; and

b) his past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

The basis for the Registrar's proposal is the contention that the individual applicants, being the officers and directors of the corporate applicant, arranged their corporate affairs so as to avoid complying with an outstanding judgment obtained by a consumer against them. The applicants thus conducted their business in a manner that was not financially responsible and without the requisite integrity and honesty in an industry regulated to protect the public.

The applicants appeal the proposal of the Registrar on the basis that their corporate dealings were driven by other legitimate business reasons, which in themselves, do not lead to the conclusion by the Registrar that they should not be allowed to carry on business under the Act.

The facts are as follows:

In May 1986, the individual applicants, all licensed under the Act for many years, were the officers and directors of 86055 Canada Limited, carrying on business as LVG Auctioneers ("LVG Auctioneers"). LVG Auctioneers conducted auctions of equipment and vehicles, including motor vehicles and as such, was licensed as a motor vehicle dealer.

G. M. Smith Ltd., a major heavy equipment and haulage company, agreed orally with LVG Auctioneers in May 1986 that the latter would auction 3 tractors and 2 trailers for G.M. Smith, guaranteeing a price of \$72,000. This price was not obtained, with G.M. Smith receiving only \$41,132.00, being the proceeds of the actual sales minus certain deductions.

In June 1986, G. M. Smith commenced legal proceedings against LVG Auctioneers for the unpaid balance.

In January 1989, G.M.Smith successfully obtained judgment against LVG Auctioneers for \$36,099.50.

In May 1991, the trial decision was upheld on appeal. With costs and interest, G.M. Smith's claim now exceeds \$60,000.00

In December 1986, LVG Auctioneers amalgamated with 571417 Ontario Inc., a related company, whose asset was a hotel and which was owned by Mr. Visch and Mr. Gardiner. At the time of the amalgamation, 571417 Ontario Inc. was in a deficit position in excess of \$180,000, and LVG Auctioneers was in a breakeven position. The amalgamated company was 86055 Canada Ltd., carrying on business as LVG Auctions (the "Amalgamated Company").

For the fiscal year ending on November 30, 1988, financial statements for the Amalgamated Company show dividends issued of \$165,000.00. It was not disputed that these dividends were received by the three principals of the Amalgamated Company, being the individual applicants here. The same financial statements show the Amalgamated Company having assets of \$570,245.00 and liabilities of \$716,363.00.

In January 1989, the corporate applicant here: G.V.L. Auctions Inc., carrying on business as LVG Auctions, was incorporated.

In March 1989, the Amalgamated Company ceased active operation and in June 1989, it voluntarily terminated its motor vehicle dealer registration.

For the fiscal year ending on November 30, 1990, financial statements for the Amalgamated Company show a decrease in assets: in 1989, assets are \$33,127.00, and in 1990, they are \$13,348.00 (down from \$570,245.00 in assets in 1988).

The same financial statements show that the Amalgamated Company has also reduced its numerous liabilities (from 1988, shown to be \$716,363.00) to only two liabilities: in 1989, one debt of \$38,000.00 to G. M. Smith (treated as a prior period adjustment as at December 1986) and one debt of \$203,822.00 to G.V. L. Auctions Inc., a related company and the corporate applicant here; in 1990, \$46,000.00 is shown to be owing to G. M. Smith and \$183,560.00 to be owing to G.V.L. Auctions.

Testimony was given by the tax accountant for the applicants that G.V.L. Auctions has assumed the Amalgamated Company's bank indebtedness of some \$200,000.00 in 1989. Because the Amalgamated Company ceased operations in 1989, its liability to G.V.L. Auctions remained basically unchanged from 1989 onwards.

In September 1991, the Amalgamated Company declared bankruptcy, leaving unsatisfied a claim by G.V.L. Auctions for \$183,975.78, and the judgment debt of G.M. Smith Ltd., now in excess of \$60,000.00.

In October 1991, G.M. Smith complained in writing to the Registrar about the judgement debt that remained unsatisfied by the bankruptcy of the Amalgamated Company.

In December 1992, G.M. Smith was paid \$10,000.00 from the Motor Vehicle Dealers Fund under the Act towards satisfaction of this debt.

Counsel for the applicants submitted at this hearing that settlement negotiations between the applicants and G.M. Smith continue to date.

The Registrar's Position

The Registrar testified that it was reasonable to view the corporate arrangements of the applicants solely as a contrivance to avoid payment of a debt owed to a consumer.

In particular, the corporate arrangements that were suspect, in the Registrar's opinion, were: 1) the amalgamation in 1986 of LVG Auctioneers with 571417 Ontario Inc., which burdened the Amalgamated Company with debts, where before there had been none; 2) the payment of dividends to the principals of the Amalgamated Company in 1988 and the "stripping of assets", to use the words of the Registrar, from the Company in 1989 and 1990; 3) the incorporation and activation of G.V.L. Auctions Inc., the current registrant here, in 1989; and 4) the voluntary bankruptcy of the Amalgamated Company in 1991, leaving only one consumer creditor unsatisfied: G.M. Smith Ltd.

The Registrar was thus concerned about the protection of consumers in dealing with the applicants in the future because of the unwillingness or inability of the applicants in the past to comply with a court order, nearly two years old, that rendered a substantial judgment in favour of a consumer.

The Registrar testified that he made no inquiries of the individual applicants regarding their corporate arrangements nor did he undertake any other effort to obtain an explanation for these arrangements.

Nevertheless, the Registrar testified that irrespective of not hearing the other side in advance of the decision, the decision would have remained the same.

The Applicants' Position

The applicants contend that their licenses should not be revoked for the following reasons: 1) G.M. Smith's judgment remains unsatisfied because the claim was disputed until appeal at which time there were no monies to pay the judgment; 2) the corporate arrangements of the applicants were explainable as commercially motivated; and 3) the individual applicants have been registered for many years without being the subject of any complaints and,

with the corporate applicant, continue to carry on substantial business again without complaint.

Thus, according to the applicants, the Registrar's concern for the protection of the public, solely on the basis on one consumer complaint arising out of a bankruptcy, is misplaced.

Oral judgment was given by the Tribunal at the close of the hearing on February 3, 1993. As stated, there are two flaws with the Registrar's proposal that we hold to be fatal to its execution. Following the guidance of the Divisional Court in Brenner v. Registrar of Motor Vehicle Dealers and Salesmen (April 7, 1983), the Tribunal accepts that the purpose of this hearing is to decide only whether the Registrar acted reasonably in the exercise of his discretion. We hold that this is not such a case for the following reasons.

Firstly, it is incumbent upon a person in a judicial function such as that exercised by the Registrar to hear both sides and to keep an open mind while evidence is put forward. The principle of "audi alteram partem", where both parties are given equal rights to be heard by a person in a judicial function, allows justice not only to appear to be done but to be actually done.

In this case, the Registrar made no attempt to discuss with any of the registrants or their accountant technical financial matters to which logical explanations might be given to acts that might otherwise appear fraudulent or lacking in propriety. The Registrar thus exercised his discretion on the basis of hearing one side only. It appeared to the Tribunal that the Registrar had made up his mind in advance and nothing would shake that resolution.

In our opinion, this constitutes a flaw that taints the Registrar's proposal and leads us to the belief that the proposal should not issue as drafted. Such a flaw may not always be fatal in cases where the evidence led before us supports the Registrar's view.

However, such is not the case here, which constitutes the second flaw with the Registrar's proposal, in our opinion. The Registrar alleged in effect a web of deceit on the part of the applicants to deprive a consumer of a right to be paid a claim. This web of deceit was spun out of the applicants' corporate arrangements, consisting principally of the amalgamation, the payment of dividends and the stripping of Company assets, the incorporation of the corporate applicant here and the voluntary bankruptcy of the Amalgamated Company.

In the opinion of the Tribunal, each of the corporate arrangements were explained in a logical, consistent and credible

manner by the witnesses, which included the applicants, and their accountant. The trustee in bankruptcy, who was appointed by G.M. Smith Ltd. and who replaced the original trustee appointed by the applicants and thus can be taken to be an impartial witness also testified.

Respecting the amalgamation, the accountant for the applicants testified that he initiated this idea for credible tax reasons at a time when he was unaware of G.M. Smith's claim. Upon hearing the accountant's testimony respecting the reasons for the amalgamation, the Registrar acknowledged that the explanation seemed credible.

Regarding the payment of dividends, the accountant testified that again the impetus for such payment was the favourable tax treatment afforded this type of remuneration. There is nothing in the payment of such dividends that appears to put the public at risk.

The incorporation and activation of G.V.L. Auctions was motivated by concerns, expressed by the individual applicants' accountant, about contingent liabilities that might arise out of 571417 Ontario Inc. and its hotel business.

The reasonable explanations given to this Tribunal of the applicants' corporate arrangements persuade the Tribunal that there existed no web of deceit, no contrivances long thought out and carried to fruition.

Thus, the basis for the Registrar's belief that the individuals and their ongoing company should have their licenses revoked appears to rest solely upon the non-payment of a company creditor who perhaps could have been paid if the principals of the company had provided personal funds to do so.

Firstly, the Tribunal notes that the consumer creditor here, although certainly a consumer under the Act, was not unsophisticated or commercially unaware. Secondly, the bankruptcy that left this consumer creditor unsatisfied was found to be lacking in impropriety, according to the testimony of the trustee in bankruptcy appointed by G.M. Smith Ltd. itself.

What we have in effect is a creditor who lost money as a result of a bankruptcy, whether or not this was wished by the individual applicants or a felicitous consequence. The fact that the individual applicants chose to refrain from using their personal funds to pay this creditor or to avoid bankruptcy does not constitute to us any signal to the industry that these applicants are not obliged to look out for consumers.

Therefore, in the opinion of the Tribunal, the Registrar exercised his discretion improperly to base his decision to revoke the applicants' licenses upon this one result: one consumer creditor unsatisfied because of a registrant's bankruptcy.

The Tribunal notes that the individuals have a long history as registrants and have been involved in numerous transactions without complaint. No evidence was led that these individuals have ever been bankrupt and are not financially responsible. As well, G.V.L. Auctions, which has been carrying on substantial business for over three years, is financially sound, according to testimony of the company's accountant.

Under these circumstances, our judgement is that the Registrar's Proposal cannot stand and that the applicants should retain their licenses.

On the other hand, the retention of their licenses must be under certain conditions in view of the fact that a consumer was affected by a bankruptcy that took place in a regulated industry where the Registrar and the Legislature and this Tribunal have utmost in our minds the protection of the public. The following conditions are attached in order for the applicants to retain their licenses:

- 1) For the next two years, at three month intervals, G.V.L. Auctions must report in writing to the Registrar any court actions, not solely judgments, in which the company is being sued by a consumer; and
- 2) the Tribunal and the Registrar are to be informed if and what settlement is reached with G.M. Smith Ltd.

TOMMY CM NGAI
(TOM'S AUTO SALES)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES;

TOMMY CM NGAI, appearing on his own behalf

CHRISTINA CHRISTOPHE, representing the Registrar
under the Motor Vehicle Dealers and Salesmen Act

DATE OF

HEARING: 28 April 1993

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal following the issue of a Notice of Proposal to revoke the registration of the Applicant as a motor vehicle dealer which Notice was issued by the Registrar of Motor Vehicle Dealers and Salespersons on October 13, 1992. The relevant facts were not in dispute.

In an application made upon the Ministry's prescribed form and dated April 1, 1992, the Applicant applied for registration as a motor vehicle dealer. His application was approved by the Registrar's office and the registration was issued to him on May 12, 1992. In his application, he had listed his business address from which he would be carrying on his business as Tommy CM Ngai, o/a Tom's Auto Sales, 5955 Airport Road, Airway Centre, Suite 237, Mississauga, Ontario, L4V 1R9.

On or about July 19, 1992, Mr. Ian Carry, a Compliance Officer with the Ministry attended at the 5955 Airport Road and made a report of his findings on July 20, 1992. He found no evidence whatever of the Applicant's being at these premises or of ever having been there. The occupant of the suite noted above had never heard of the Applicant. There were no cars for sale by anyone at the premises and there was no sign in place or anything to indicate the presence of this business. The Registrar Mr. Pierce then gave evidence that in the situation, as found, the Applicant was clearly in breach of the requirements of the Motor Vehicle Dealers Act and Regulations made thereunder, that his office had made a

considerable effort to get the Applicant to comply with the requirements and found that they had no alternative but to issue the Proposal.

Section 13(3) of Regulation 665 made under the Act provides that:

It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer,

- (a) operates from premises located in Ontario that are approved by the Registrar;
- (b) has an office for the conduct of business at each premises where the motor vehicle dealer operates; and
- (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.

The Applicant told the Tribunal that at the time he made the application, there was another business being operated in the premises in question by two partners and he, the Applicant, had made arrangements with one of them to share the premises and the expenses. Very shortly after he got the registration, he was called out of the country to Hong Kong where he was for some time and when he returned to Canada, the two partners aforementioned had broken up and the man with whom he had had the arrangement was no longer there and he was not able to open his business at those premises. He told of making efforts to get other premises, but these had been unsuccessful. He confirmed the fact that he has never done any business whatever under the licence.

During the argument, two alternate courses of action were discussed with the Applicant and with counsel for the Registrar. It is obvious that the Registrar cannot permit the situation to continue as it is and the question became whether the Applicant should be given a short period further to find suitable premises and bring his business within the Regulations or whether the Registrar's Proposal should be carried out and the Applicant be required to apply again for registration if he wishes to do so when he is in a position to meet the requirements of the Act and the Regulations. It is the decision of the Tribunal that the Registrar should be directed to carry out his Proposal because the Applicant has already had a considerable period of time to comply with the requirements and during that time he never contacted the Registrar's office to try to work out the problem and he never even notified that office of the problem which he had with premises.

The Tribunal wishes to note that the conduct of the Applicant has not been such as to create any serious objection against him if he applies again for registration, but he must appreciate that if he is granted another such registration he must be in a position to comply properly with the requirements at the time he makes the application and he must be seen to do so at every stage if he is to be allowed back into this business.

Therefore, pursuant to the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

970237 ONTARIO LTD.
o/a OTONABEE SALES
and
PAUL FRANCIS MACDONELL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
TIBOR PHILIP GREGOR, Member
FRANK HARTWICK, Member

APPEARANCES:
JAMES S. HAURANEY, representing the Applicant

ROBERT CONWAY, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: 22 July 1993 Toronto

REASONS FOR DECISION AND ORDER

970237 Ontario Ltd. (the "corporate Applicant") and Paul Francis MacDonell (the "personal Applicant") appeal a decision by the Registrar under the Motor Vehicle Dealers Act (the "Act") to refuse to grant registration to the corporate Applicant as a motor vehicle dealer and to the personal Applicant as a motor vehicle salesperson.

The Registrar's decision is contained in a Proposal dated 27 October 1992, and further particularized in a Notice of Further or Other Particulars dated 13 July 1993.

The Registrar relies upon section 5 of the Act, determining that the Applicants are not entitled to registration because the personal Applicant is the president and shareholder of record of the corporate Applicant and the past conduct of the personal Applicant affords reasonable grounds for the belief that both he and the corporate Applicant will not carry on business in accordance with law and with honesty and integrity.

The Registrar's concerns are based principally upon the criminal record of Mr. MacDonell: that is, the extent and nature of the criminal record, as well as Mr. MacDonell's failure to disclose this record fully in his 1982 application under the Act.

The Registrar agreed in testimony that Mr. MacDonell accompanied his most recent application in 1992 with a copy of his criminal record, detailing convictions from June 1972 until January 1991.

Briefly, Mr. MacDonell's criminal record involves 17 convictions, beginning when Mr. MacDonell was 18 years of age and continuing over a span of some 20 years. Convictions include 2 for assault in 1976 and 1984, as well as resisting arrest in 1986 and causing a disturbance in 1991. Sentencing dispositions ranged from probation to fines to 30 days in jail.

More specifically, Mr. MacDonell was convicted in 1972 of 5 offenses: 2 for possession of stolen property, as well as theft under \$200, attempted theft under \$200 and carrying a concealed weapon. In 1986, Mr. MacDonell was convicted of 2 driving and alcohol related offenses, as well as obstructing a police officer. In 1987, Mr. MacDonell was convicted of acquiring a firearm without appropriate certification.

During the period from March 1983 until October 1984, when Mr. MacDonell was registered under the Act both as a motor vehicle salesman and as shareholder of record for Discount-Rent-A-Car, he was convicted of assault, possession of a narcotic and 3 charges of failing to comply with a recognizance.

In October 1982, Mr. MacDonell, in each application for registration under the Act for the period of 1983 - 1984, disclosed only that he had been convicted of assault in 1975.

The Registrar voiced concerns about Mr. MacDonell's failure to disclose on his October 1982 applications that he had been convicted of 6 other offenses, in addition to the assault charge. These include the 5 charges in 1972, noted above, as well as a mischief charge in 1973.

The Registrar agreed that he had no knowledge that Mr. MacDonell did not otherwise comply with the Act during his period of registration from 1983 until voluntary termination in 1984.

However, counsel for the Registrar argued that Mr. MacDonell's failure to fully disclose his criminal record in his 1982 applications not only contravened the Act but concealed from the Registrar convictions for crimes of dishonesty.

This, in addition to the nature and extent of Mr. MacDonell's criminal record, caused the Registrar to believe that both the corporate Applicant and the personal Applicant will not carry on business in accordance with the law and with honesty and integrity.

In the Registrar's view, certain of Mr. MacDonell's convictions demonstrate a propensity to disregard the law: for example, 3 convictions for failing to comply with a recognizance in 1984, resisting arrest and obstructing a police officer in 1986 and acquiring a firearm with certification in 1987.

As well, the Registrar was of the opinion that other convictions show that Mr. MacDonell has a propensity for violent and disorderly conduct: for example, 2 assault convictions in 1976 and 1984 and causing a disturbance in 1991.

Finally, the Registrar noted that Mr. MacDonell continued to be convicted of criminal offenses before, during and after registration under the Act.

The Registrar, however, did agree in testimony that he had no knowledge of the circumstances of the convictions from 1972 until 1991.

In response to the Registrar's position, Mr. MacDonell chose not to testify in this hearing.

However, arguments made by counsel on behalf of the Applicants included the proposition that a criminal record should not prevent an applicant from earning a livelihood. As well, counsel for the Applicants asked the Tribunal to note that Mr. MacDonell's offenses of dishonesty occurred in 1972 at the age of 18. Counsel further asked the Tribunal to take into account the fact that Mr. MacDonell had voluntarily disclosed his criminal record in his 1992 applications.

Upon consideration of these arguments, this Tribunal notes that Mr. MacDonell is seeking registration to work in an industry regulated to protect the public and he has chosen to provide this Tribunal with no context whatsoever respecting his extensive criminal record.

The Tribunal further notes that Mr. MacDonell failed to act with the utmost honesty, at the age of 28 in 1982, when he did not fully disclose his criminal record in his applications. As well, the Tribunal considers that Mr. MacDonell is obliged to make full disclosure upon any application under the Act.

This Tribunal is of the view that under all the circumstances a criminal record such as Mr. MacDonell's is sufficient bar to registration under the Act. Mr. MacDonell has presented no evidence to persuade this Tribunal that the Registrar erred in finding reasonable grounds for refusing to grant registration to the Applicants.

Accordingly, by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to grant registration to the Applicants.

OAK RIDGES MOTORS LIMITED

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
TIBOR PHILIP GREGOR, Member
FRANK HARTWICK, Member

APPEARANCES:

ROBERT CONWAY, representing the Registrar under the
Motor Vehicle Dealers Act

No one appearing for the Applicant

DATE OF

HEARING: 22 July 1993

Toronto

REASONS FOR DECISION AND ORDER

No one appearing for the Applicant by 10:00 in the forenoon, upon the application of counsel, the Tribunal directs the Registrar to carry out the Proposal dated October 13, 1992, to revoke the registration of the Applicant.

The above decision and reasons therefor were orally given by the Vice-Chair at the conclusion of the hearing in the presence of the other members who concurred.

BERTHA PARKER

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
OF THE MOTOR VEHICLE DEALERS' COMPENSATION FUND

FOR REFUND OF MONIES

TRIBUNAL: RONALD J. POIRIER, Vice-Chairman, presiding

APPEARANCES;

BERTHA PARKER, appearing on her own behalf

, representing the Board of Trustees
of the Motor Vehicle Dealer's Compensation Fund

DATE OF

HEARING: 4 November 1992

Thunder Bay

REASONS FOR DECISION AND ORDER

FACTS

On November 4, 1992 Bertha Parker appeared in person before the Tribunal in Thunder Bay. The facts as disclosed by witnesses called by both Mrs. Parker and the Motor Vehicle Dealers Fund were not in dispute. On June 5th, 1991 Mrs. Parker purchased a 1988 Olds Cutlass Ciera from Avis Car Sales. She was promised certain repairs would be done and these repairs were listed on the Purchase Agreement which is found in the Exhibit book filed as Exhibit 4 in these proceedings. The items which appear on the contract are as follows: safety check, clean up, repair front seat lock, hood prop, dent, cigar lighter, lubricate hinges. The contract was dated June 6, 1991 and Mrs. Parker accepted delivery on June 8, 1991 at which time she was told that a couple of the above items had not yet been repaired. These items still remain outstanding and have a total value of \$31.73. Unfortunately, within three days of Mrs. Parker taking delivery of the car it developed a stalling problem for which Mrs. Parker had repaired by another garage for a total cost of \$437.72. Mrs. Park now looks to the Motor Vehicle Dealer's Compensation Fund for payment of that amount.

THE LAW

The Motor Vehicle Dealers in Section 21 of Regulation 665 provides for a compensation fund for damages which result from dealings with a registered motor vehicle dealer.

In Section 21(12)(3), the Regulations states as follows:

(3) A customer may make a claim against the Fund where he gives written notice of the claim to the Registrar within two years of the participants' refusal or failure to pay, notwithstanding that the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements.

(1) the customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as taxed.

It is conceded that Mrs. Parker has obtained judgment for the \$437.72, but the position taken by the representatives of the Fund is that Mrs. Parker's claim is not one that can be advanced because it does not meet the requirements of the definition of claim found in s.1(c) of the Schedule in Section 21 of the Regulations which reads as follows:

(c) Claim means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

Mrs. Parker takes the position that the stalling problem which was not an item mentioned as to be repaired on the Purchase Agreement is such a claim. Mr. Pierce representing the Registrar of Motor Vehicle Dealers Compensation Fund takes the position that anything not part of the contract is beyond the scope of claim as contemplated by the above noted Regulation.

Should Mrs. Parker's argument that "claim" as referred to in the Regulations includes something not being contemplated at the time the contract was made then the effect would be to put the Fund in the position of a Warranty Carrier. This would create very serious problems since the Fund would be faced with claims without having the protection of the special limitations and exclusions commonly found in all warranty agreements.

The fact that these limitations and exclusions are not addressed in the Regulations reinforces the Tribunal's opinion that claims referred to in the Regulations can only mean a claim arising out of some breach of the specific transaction involving the purchase or sale of the motor vehicle. It follows, therefore, that the only claim that Mrs. Parker could advance would be for a specific breach of any written or oral agreement between her and Avis. There was no evidence of any oral agreement to repair the stalling problem at the time of purchase and no such term appears on the actual contract. As such the Tribunal finds that Mrs. Parker is entitled to payment for \$31.73 and her further claim is disallowed.

EARL H. PROVOST

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
JUDITH KILLORAN, Chair as Member
DONALD STRUPAT, Member

APPEARANCES;

EARL H. PROVOST, appearing on his own behalf

BEVERLEY WISE, representing the Registrar
under the Motor Vehicle Dealers and Salesmen Act

DATE OF

HEARING: 28 October 1993

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal to revoke the registration issued by the Registrar of Motor Vehicle Dealers and Salesman to the Applicant on May 21, 1993, and a Notice of Further Particulars dated October 20, 1993.

The Applicant is a man 73 years of age whose wife owns and operates a variety store at 3216 Danforth Avenue in Toronto in which business he has assisted her and particularly through a recent illness when he looked after it completely. On December 24, 1990, he obtained from the Registrar a registration as a motor vehicle dealer to operate as the sole proprietor of a wholesale motor vehicle dealership under the name of Provost Enterprises. He gave as a business address on his application the 3216 Danforth Avenue address. He said he has been associated with the motor vehicle selling business for fourteen years prior to that and from October 17, 1988 to June 1, 1989 as a registered salesperson and otherwise in non-selling capacities. He has filed an application for renewal of his registration on time, but the Registrar has not dealt with it pending the resolution of the difficulties which have led to this hearing.

At the time the Applicant applied for his wholesale registration in December of 1990, he supplied to the office of the Registrar a Statutory Declaration which contained the following provisions:

- A) that the declarant Motor Vehicle Dealer shall conduct business operations from commercial premises which are not in contravention of any municipal by-laws or provincial statutes and for which a letter or business licence from the municipality is included with this application for registration.
- B) that all books and records required to be kept by the Motor Vehicle Dealers Act or other records relating to the business operations of the dealership be maintained and stored at the commercial business premises. At no time will the books and records of the business nor the motor vehicles owned by the business be stored and maintained or offered for sale from residential property.
- C) that the motor vehicles may be purchased from manufacturers and/or registered motor vehicle dealers for the purpose of:
 - 1) resale to registered Motor Vehicle dealers directly or those persons holding duly recognized out of province exemption certificates;
 - 2) resale to registered Motor Vehicle Dealers through a Motor Vehicle Dealer Auction;
- G) that at no time the dealer engage in the buying or selling of motor vehicles directly with the general public other than declared above, and further that a violation of the terms and conditions of this declaration shall be sufficient grounds for revocation of the dealer's registration in accordance with the Motor Vehicle Dealers Act (by the Registrar.)

In addition, he was under certain restrictions imposed by the Municipality concerning the use of the premises and his business, two of which are:

"04. THE BYLAW PERMITS ONLY AN OFFICE USE, WITH NO VEHICLES STORED FOR SALE OR LEASE.

05. THE BYLAW DOES NOT PERMIT SALE OR LEASE OF VEHICLES ON THESE PREMISES."

On March 30, 1993, the Assistant Registrar instructed an inspector with the Ministry, one Tammy Watson, to conduct an inspection of the premises pursuant to Section 10.1 of the Motor Vehicle Dealers Act and particularly to "Please determine if books and records are maintained in a commercial office." The inspector did this on April 1, 1993 and made a report which said in part:

.....
Please note the above captioned address is occupied by a variety store owned by Mr. Provost. There is no sign at all indicating Provost Enterprises. When I requested Mr. Provost to produce his books and records to be inspected he refused, explaining he did not have any books and that even if he did, I could not look at them because it was nobody's business but his about his company, financial or otherwise, specifically Pierce and Vescio.

Mr. Provost explained he does not have a garage register or wholesale contracts and he further believes he does not need them. Mr. Provost further stated he has three cars behind his store. (Note; I did not copy the VIN's as I was unsure how he would react and did not want to upset his hostility further). I informed him he in fact does need such documents. Mr. Provost is under the impression that he does not need the Registrar's permission in the form of registration to buy motor vehicles from auctions then sell them to dealers, but he does want a licence. He further stated that if he did not get registered in Ontario then he would go to the province of Quebec for registration.

Please note that during the time I was in the Variety Store, Mr. Provost was hostile using vulgar language. He at one point "dared" the Registrar to take him to Tribunal because Mr. Provost was right and everyone else didn't know what they were talking about. }

In her oral evidence at the hearing, the inspector said when she asked to see the books and records the Applicant told her that there were not any and added that, even if there were, he would not let her see them. She said he spoke strongly against both the Registrar and the Assistant Registrar and was generally abusive. On the question of a sign she said she did not see any sign on the premises. When referred to photographs of a sign inside where she was, she said she did not see it and that she believes she would have seen it if it had been there at that time. When referred to a sign in a photograph of the back outside of the premises, she said she was not back there and could not comment on this. She told the Tribunal that she had been afraid to go back into the office inside or to go back through a laneway leading to the outside because of the attitude of the Applicant.

It was the Applicant's evidence that he has done practically no business under the licence since he has had it. He said he bought two trucks and a computer printout produced by the Registrar indicates that he bought these and one other vehicle in the name of Provost Enterprises. He said he did not keep books because his accountant told him it would cost \$300 to set them up and his business did not warrant this. He said that the accountant's view was that all he would have to do was explain these facts and he should have no difficulty. It would appear that the accountant

probably gave the advice based on the requirements of the Income Tax Act and probably was not aware of the requirements of the Motor Vehicle Dealers Act.

The Proposal of the Registrar is based solely upon the ground that the registrant is not entitled to registration as "...the Registrant is carrying on activities that are in contravention of the Act or the regulations and/or is in breach of a term or condition of registration", and there is a clear requirement for all motor vehicle dealers to keep records of all transactions with motor vehicles (see Section 15 of Regulation 801 made pursuant to the Act):

15. Every motor vehicle dealer shall, with respect to the purchase or sale of a motor vehicle, maintain for a period of two years from the date of expiry of any warranty or service plan covering the vehicle all purchase orders, sales orders and written records of all transactions resulting in the purchase or sale of the motor vehicle and in the case of a used motor vehicle,

- (a) a complete record of any reconditioning or other work performed on the vehicle that includes the date and particulars of the work done, repair orders and the cost of the work done; and
- (b) the details and cost of any inspection conducted under Regulation 611 of Revised Regulations of Ontario, 1990 (Safety Inspections).

It is equally clear on the Applicant's own evidence that he did not keep such books and records.

There is a clear requirement with regard to signs to be erected (see Section 13(4)(c)):

13.(4) It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer,

.....
 (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.

Neither of the signs shown in photographs supplied by the Applicant comply with these Regulations as neither of them identify the motor vehicle dealer's registered name.

During the course of the hearing, the Applicant told the Tribunal that it was his practice and would continue to be his practice to buy used cars and leave them with other dealers to be sold "on consignment". It was the evidence of the Registrar, Mr. Pierce that this practice is illegal being contrary to Section 3(3) of the Act:

3.(3) A registered motor vehicle dealer shall not carry on business in a name other than the name in which it is registered or invite the public to deal at a place other than that authorized by the registration.

The Registrar also complained that the Applicant breached the provisions of Section 11(1) of the Act:

11.(1) Upon an inspection under section 9 or 10, the person inspecting,

(a) is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspection; and

.....
and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.

The evidence of the Applicant was contradictory on this point. At one time, he said he had no books or records and at another time he said he had records of all the transactions which he had carried on pursuant to his registration recorded in a book. Either way he is in breach of the requirements. If he had no books or records, he was in breach of the requirement to keep them. If he did have them and refused to let the inspector see them, he is in breach of the requirement not to obstruct.

All together the Tribunal must, on all of this evidence, conclude that the Applicant has breached several of the provisions

of the Act and of the Regulations and of the terms and conditions of his registration and we must uphold the Proposal of the Registrar with a note that, if the circumstances with regard to the pending application for renewal are as we understand them to be, it will not be dealt with and the Applicant should receive a refund of his fee paid therefor.

Accordingly pursuant to the provisions of section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen to carry out his Proposal.

LEOPOLD SKORSKI
(FACER AUTO BODY)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
MICHAEL E. LERANBAUM, Member
FRANK HARTWICK, Member

APPEARANCES;

LAURIE DAVIDSON, representing the Registrar under
the Motor Vehicle Dealers Act

No one representing the Applicant

DATE OF

HEARING: 17 February 1993

Toronto

REASONS FOR DECISION AND ORDER

On the basis of the evidence which we have heard and on the submission of counsel, it is quite clear that on reading the Regulations, Section 13(3) provides that it is a condition of registration, and it is to be noted that it is a condition precedent for registration as a motor vehicle dealer, that the motor vehicle dealer operate from premises located in Ontario approved by the Registrar.

The evidence is clear that that has not been the situation with respect to the premises located at 142 Dunkirk Road in the City of St. Catharines. Secondly, a condition is that there be an office for the conduct of business at each premises where the motor vehicle dealer operates and while there was some evidence given that there may have been offices, they were shared offices with that of Passero National Collision. The third condition precedent was that erected at each premises where the motor vehicle dealer operates, there must be a sign clearly visible to the public that identifies the motor vehicle dealer's registered name. The registered name is Mr. Skorski or Facer Auto Body and the indication from the evidence of the inspector Ms. Lizotte was that no such sign appeared at the premises from which Mr. Skorski was allegedly operating and which he had identified in his application.

It is noted as well that Mr. Skorski was not available on the first inspection, that latterly in February 1993 he did attend at those premises and clearly identified that he was for the most part not operating from those premises. I think the evidence indicated that about 95% of his business was conducted at the auto auction.

It, therefore, is the view of this Tribunal, particularly in view of the clear requirements under the Act and Regulations and in view of the fact that this legislation is consumer protection legislation that the elements of the Registrar's Proposal have been clearly confirmed by the evidence presented to this Tribunal and, therefore, in accordance with the provisions of Section 7(4) of the Motor Vehicle Dealers Act, under the authority of that Section, this Tribunal directs the Registrar to carry out the Proposal against Mr. Skorski and Facer Auto Body.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Vice-Chairman in the presence of the other members who concurred.

AZAMAT ZAREIAN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
GERRY BEECH, Member
FRANK HARTWICK, Member

APPEARANCES;
MICHELE GORDON, representing the Applicant

ROBERT CONWAY, representing the Registrar
under the Motor Vehicle Dealers and Salesmen Act

DATE OF
HEARING: 26 May 1993 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal issued by the Registrar of Motor Vehicle Dealers and Salespersons to the Applicant on July 8, 1982 in which the Registrar proposes to refuse to grant registration to the Applicant as a motor vehicle salesperson upon the ground that, in the Registrar's opinion, the Applicant is not entitled to registration under Section 5 of the Motor Vehicle Dealer's Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The facts of the matter are as follows.

The Applicant was born in 1946 in Iran, is married and has two children. He left Iran and went to the Philippines in 1977 and was there for five years and came to Canada in 1982. Until he came here, he could speak no English. Farsi or Persian is his language at home. He now speaks quite good English although, quite noticeably, he has some comprehension problems with this language. In Iran, he was a hydro inspector and also a mechanic. He studied and worked at electrical engineering in the Philippines. When he came to Canada, he began working as a mechanic. He has obtained his Inter-provincial licence as a mechanic getting it on his second application, the failure the first time being largely due to his language problem. In 1983, he began working as a mechanic and worked in several motor vehicle establishments as a mechanic. These were establishments which bought and sold vehicles and in

June 1986, he obtained a registration as a motor vehicle dealer under the Act and had the same until June 12, 1988. During the greater part of this time, he was a partner in this business and as a dealer was buying and selling cars. At the end of the 1987, he sold his interest in this business and after that time he had no premises as required by the Act and the Regulations to carry on the business of a motor vehicle dealer and indeed no business to carry on.

In 1986, a new Motor Vehicle Dealers Compensation Fund was established under Section 4 of the Motor Vehicle Dealers Act and all then registrants were required to pay \$300 into this fund at the time their next two year renewal of their registration came up. By the time this payment was required of the Applicant in 1988, he attended at the office of the Ministry to discuss what he should do and was told that he could not renew his registration in any event, quite apart from the question of this payment, because he was out of business and had no premises. Accordingly he did not pay this money. As a result of this failure to pay, the Registrar of the day issued a Proposal on March 15, 1988 to revoke his registration because he was operating in contravention of the Act and the Regulations and the Proposal took effect on June 12, 1988.

On March 2, 1992, the Applicant submitted a new application for registration as a salesperson under the Motor Vehicle Dealers Act. It is this application which the Registrar has proposed to refuse which has led to this hearing.

The past conduct on the part of the Applicant which has led the Registrar to his conclusion is set out in paragraphs 2 and 3 of the Particulars outlined in the Registrar's Notice of Proposal which read as follows:

2. During the period commencing May 26, 1988 and ending February 12, 1992, Zareian illegally carried on business as a motor vehicle dealer, as is evidenced by the fact that during that period he purchased and resold the following thirteen (13) vehicles while not registered under the Act or its predecessor in force at the time of the transaction:

Year & Make of Vehicle	Date Applicant Purchased	Date Applicant Resold	Purchaser
1. 1984 BMW 318	Jan. 21/92	Feb. 12/92	Tran. Vu, Quyen,
2. 1983 Honda Civic	Jan. 6/92	Jan. 22/91	Vo, Vinh, Khoa
3. 1986 Suburban	Sept. 17/90	Feb. 5/91	Kobak, Stephan
4. 1982 Mazda 626	Feb. 7/90	Mar. 20/90	Khafajian, Mohammad, S.
5. 1982 Honda Acc	Jan. 18/89	Mar. 2/89	Chung, Siu-Fai
6. 1980 Chev Cit	June 14/88	Sept. 28/88	Davoudi, Siamak
7. 1982 Mazda 626	May 31/91	Dec. 12/91	Jowharian, Eric, Omid
8. 1984 Mazda 626	Aug. 9/90	Sept. 14/90	Yaghini, Badiollah
9. 1985 Mazda GLC	Dec. 5/89	Apr. 12/90	Kardan, Abdolamir
10. 1982 Dodge B35	June 13/89	Aug. 10/90	Manuel, John, A.
11. 1981 Mazda 626	Dec. 21/88	Nov. 27/89	Shahmoradi, Shahla
12. 1982 Volk JDX	May 26/88	Aug. 11/88	Purziaei, Nosratollah
13. 1980 Mazda GWC	June 2/88	June 8/88	Atbin, Fardin

3. In response to question 9 of the application, "Have you ever had a registration and/or license of any kind refused, suspended, revoked, or cancelled? If yes, attach particulars.", Zareian falsely responded "No". His answer was false because his registration as a motor vehicle dealer was revoked on May 9, 1988 for failure to make the required payment of \$300.00 to the Motor Vehicle Dealers Compensation Fund on or before September 1st, 1986.

Apart from this conduct on the part of the Applicant, there is nothing else indicated on his part which has attracted any criticism.

The issue which the Tribunal must determine, therefore, is whether, when it takes into account all of the evidence we have concerning the allegations of trading without a licence set out in paragraph 2 and the allegations of making a false answer as set out in paragraph 3 of the Notice, it thinks the Registrar was in error in concluding that this conduct on the part of the Applicant afforded reasonable grounds for believing that the Applicant would not carry on business in accordance with law and with integrity and honesty. (see re Brenner 19 CRAT SCO Decisions 1971-89, p.58)

To determine this question, we must examine the evidence.

The case for the Registrar is basically set out from the facts alleged in the two paragraphs which are not in dispute, as such, and from inferences which counsel for the Registrar asks us to draw from them. The case for the Applicant is based upon his explanation of what happened and his reasons for doing what he did. We shall deal first with the allegation of dishonesty when answering the question stating that there had been no prior revocation of his registration. The Tribunal has no difficulty in accepting the truth of Mr. Zareian's explanation about this. He impressed us as an honest and forthright witness who appeared to answer questions as honestly and accurately as he could. He appeared not to be concerned whether an answer might or might hurt his case. He did exhibit some difficulty from time to time with the English language. At the time he attended at the Ministry's office to enquire about the requirement to pay the \$300 and decided not to do so because he could not renew his registration anyway for the reasons indicated above, we accept his explanation that he did not understand that the legal effect of his decision was to trigger the revocation of his licence rather than his resigning it or just allowing it to lapse. We cannot, in these circumstances, find any intention of wrongdoing on his part when he answered "No" to the question, and we have reached the conclusion that the Registrar was in error in relying on these facts in reaching his conclusions. As far as the earlier registration was concerned, the Applicant simply thought he had let it lapse. He was not aware of the legal step of its being revoked when he did not pay the \$300 and had no intention of misleading anyone when he answered "No" to the question.

Nor do we think this Applicant had any intention of cheating or breaking the rules when he dealt with the 13 motor vehicles listed in paragraph 2 of the Particulars. While a general statement to this effect applying to all of them together would appear to strain credulity, a different picture emerges when they

are taken one by one. With regard to the first two vehicles, the 1984 BMW 318 and the 1983 Honda Civic, the Applicant owned them and he and his wife drove them. He made an agreement with another party to trade vehicles and each party agreed to try them out first to decide whether they wished to stay with the trade. Mr. Zareian said that the reason each of the vehicles was transferred into the name of the other at the time they were taken to try them out was that the other party would not proceed with a situation in which someone else was driving the vehicle registered in his name. He took this position because of his understanding of insurance regulations and of his desire not to become involved in what might happen if the vehicle were involved in an accident. After this was done, the Applicant did not like the vehicle he had obtained and the parties traded them back.

With regard to vehicle No. 10 in the list, the 1982 Dodge B35, this had been used as an ambulance and the Applicant bought it at an auction and fixed it to use as a camper and used it for one and a half years as such and for himself and his family. With regard to vehicle No. 7 the 1982 Mazda 626, this was a car in which the engine had been ruined. The Applicant got it for very little, believing that he could, as a mechanic, fix it and have a very cheap car to drive. However, he found it was going to cost him more than he thought it worth to fix it and he gave it away to a friend who was also a mechanic who thought he might try and fix it. With regard to vehicle No. 13 the 1985 Mazda GWC, he bought it for personal use knowing it needed some mechanical work which he intended to do but, as a result of a discussion with another mechanic friend of his, he sold it to this mechanic.

Altogether of all these vehicles, other than the first two listed which were involved in the trade, the Applicant bought seven to see if he could fix them and use them and decided not to proceed to do so and bought the other five which either he or his wife drove. He said on the resale of the vehicles, sometimes he would make a little and sometime he would lose, never very much, perhaps overall he made a profit of less than \$1,000. He said that upon all of the purchases and sales, proper information was furnished to the Ministry of Transport to effect the transfer of the licences (which facts are corroborated by the information set out in Exhibit 6) and he said all proper taxes were paid. Mr. Zareian further said that with all of these vehicles, he always put them in his own name and never in his wife's name although during the whole time she had one of them to drive.

There are two other pieces of evidence which were of consequence in leading the Tribunal to the conclusion which we have reached - one a somewhat remarkable piece of evidence. When Mr. Zareian applied for the new registration and all of the problems began to come to light he was in communication with the Registrar's

office and he was told that, without a registration, he should not be buying motor vehicles. He took that advice so literally that, while both he and his wife require cars to drive, he does not own any at this time and they have borrowed vehicles from friends to drive. The other piece of evidence was a statement by Mr. Pierce, the Registrar of Motor Vehicle Dealers, during his evidence that "This is not one of the strongest cases that I have ever brought here."

This is very much a case in which all of the evidence which came out at the hearing casts quite a different light upon the critical question to be decided than appeared from the information available to the Registrar when he reached his original conclusion and issued his Proposal. Mr. Zareian must realize that from this time forward, if he is to keep his registration, he must do what is necessary to understand and follow the law and the Regulations properly. If in any doubt, he should seek advice either from the Registrar's office or from his own solicitors as may be appropriate in the circumstances so that he does not find himself, even inadvertently, acting in breach of something required of him.

There is another point in the case with which we must deal. In the application for registration which is the subject matter of the Proposal and of this hearing, which Proposal Mr. Zareian filed on March 2, 1992 we find the usual Certificate of an employer which in this case is shown as "North American Auto Sales". Mr. Zareian himself is associated with the management of that Company and in the case of an application of another person for registration as a salesman under the Motor Vehicle Dealers Act to be employed by that Company, it appears that it would be in order for him to sign as an Authorized Signing Official of the Company. However, his signing in that capacity of this application, when he himself is the Applicant is not proper. Before the registration sought here is issued by the Registrar, the latter should receive a Certificate from the employer signed by an Authorized Signing Officer other than the Applicant and he should also be provided with an affidavit by such officer establishing the facts that he or she has such authority and has signed the Certificate to provide what is required from an employer as part of the application.

Therefore pursuant to the authority vested in it by Section 7(4) and (5), the Tribunal directs the Registrar not to carry out his Proposal, but to grant registration to the Applicant as a salesperson under the Motor Vehicle Dealers Act, subject to the condition that, before he shall grant this registration, the Registrar shall have received from the Applicant's proposed employer North American Auto Sales a Certificate of Employer in the form set out in the application signed by an Authorized Signing Officer of that Company other than the Applicant and also an affidavit from such officer attesting to the facts that he or she

has such authority and has signed the Certificate to provide what is required from an employer as part of this application.

ENRIQUE ALLENDE
FRANCISCO ALVAREZ
NICOLA RIZZI
ALDO SGRO

APPEAL FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding

APPEARANCES:

JOHN C. PELECH, representing the Applicants

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 7 January 1993

Toronto

REASONS FOR DECISION AND ORDER

These claims against the Program for loss of deposits of \$2,000 each for each of the four Applicants emphasizes how fraught with danger is the retention of a solicitor acting for both the builder/vendor and for the purchasers. Augmenting this danger is the fact that the solicitor was also a principal of the builder/vendor. All of these facts were known by Aldo Sgro who in his evidence candidly admitted that he had worked with the solicitor in a management company prior to these four purchase transactions and who also admitted candidly that he was the contact person for the four Applicants. Mr. Sgro's English was reasonably good, but I understand that the English of the three other Applicants was not and, therefore, Mr. Sgro gave evidence on behalf of all Applicants.

The claims are identical and are based upon \$2,000 deposits reportedly issued pursuant to Agreements of Purchase and Sale executed January 27, 1990 in respect to units in a condominium project in Brantford, Ontario which purchases were never completed and the building in which the units were situate was sold by the mortgagee under a Power of Sale which document of sale was registered November 5, 1990. The issue before the Tribunal, therefore, is whether each of the Applicants having paid out \$2,000 by way of deposit, not having received a transfer of a unit and not having received a return of the \$2,000 deposit in each case is entitled to be paid out of the guarantee fund under Section

14(1)(a) as being a person having a cause of action in damages against the vendor for financial loss for failure to perform the contract.

The facts are as follows. From the evidence of Mr. Sgro, in the fall of 1989, he was participating in a management company in which he was a partner with Alan B. Silver and a builder by the name of DeMillio. He further testified that there was a company with offices proximate to his known as Diton Construction Ltd. or Diton Construction (Ontario) Ltd., the principals of whom were Anthony DeMillio, Alan B. Silver and Tom Popov. Because of this connection, he was aware that Diton Construction (Ontario) Ltd. was going to construct a condominium in Brantford and that he would be given an opportunity to acquire units in that building. He testified that the four Applicants considered forming an investment company to acquire units in the building and accordingly each of the Applicants put up the sum of \$500 in early November 1989. No agreement was entered into at the time, nor was any reservation agreement signed. Subsequently, Agreements of Purchase and Sale for each of the Applicants designated as "In Trust" were executed January 27, 1990 which agreements provided for an occupancy date of April 30, 1990, provided for a purchase price of \$99,500, acknowledged a \$2,000 deposit, and required a further payment of \$7,950 sixty days from the date of acceptance of the agreement and the balance of \$89,950 on occupancy closing. Two of the Applicants issued cheques for \$1,500 each and the Applicant Aldo Sgro issued a cheque for \$3,000 on behalf of himself and Rizzi, all of which cheques were cashed early in February 1990.

It was argued by counsel for the Program that the initial \$500 could not be designated a deposit as defined in Section 1(1) of the Regulations of the Act because there was no purchase agreement or reservation agreement which could be incorporated into the purchase agreement. Because of the acknowledgement of the deposit in the purchase agreement of January 27, 1990, I am not convinced that \$500 was not paid "before the date of possession...from a purchaser on account of the purchase price payable under a purchase agreement..." In any event, in my view the \$1,500 paid by each of the Applicants clearly was paid pursuant to the purchase agreements.

Under the purchase agreements in paragraph 5.06, the vendor was entitled to extend the time for closing for 90 days from the occupancy date of April 30, 1990 which would extend the closing until the latter part of July 1990. Mr. Sgro acknowledged that he was aware of the fact that the vendor/builder was having financial difficulty in January 1990, but believed that re-financing was in process and that he knew and observed that construction was in progress. The witness Sgro acknowledged that the investment company which was to be the vehicle for the four Applicants was a

company known as Stratas International Inc. He was shown a copy of a letter dated June 20, 1990 addressed to Stratas and while he could not recall whether he had ever seen that letter, he did indicate that he had some familiarity with the contents of it. That letter was from Alan B. Silver identifying that the closing was to take place on July 3, 1990 and requiring monies to be paid to Mr. Silver in trust in the amount of \$55,464 representing closing balances of \$9,244 multiplied by six units.

In addition, he required his fees to be paid, an amount of \$500 multiplied by six for a payment of \$3,000 in trust and 12 cheques for each unit commencing September 1, 1990 in the amount of \$1,095 each payable to Diton Construction (Ontario) Ltd. in respect to occupancy charges. Mr. Sgro has testified that no payments or cheques were ever delivered to Mr. Silver. The evidence was unclear as to whether the vendor/builder was in a position to close the transaction at that time or not in view of the fact that the power of sale proceedings were subsequently completed in November 1990. Mr. Sgro testified that he was subsequently informed by Mr. DeMillio that in order to get the \$2,000 deposit back for each of the Applicants, a document had to be signed which would be filed with the Ontario New Home Warranty Program and when the funds were received, they would then be paid over to the Applicants.

Each of these documents is identical except for the date of execution and constitutes a Mutual Release between each Applicant and Diton Construction (Ontario) Ltd. and there was a direction to an agent, not identified, to disperse the deposit of \$2,000 "to the purchaser...without delay and such funds are to be forwarded to the purchaser's solicitor". Mr. Sgro's Release was dated November 28, 1990 and both his signature and that of Diton Construction (Ontario) Ltd. were witnessed by a secretary in the office of Diton Construction (Ontario) Ltd. The other Releases were dated December 2 or December 3, 1990 and the signatures of the Applicants and of Diton Construction (Ontario) Ltd. were witnessed by Mr. Sgro.

Not having received any money, the Applicants filed claims with the Program sometime in late 1991 or early 1992 which claims were rejected by the Program by a decision letter dated May 7, 1992 on the basis that the Mutual Release had been executed which eliminated the right under section 14(1)(a) of the Act for the Applicants to have a cause of action in damages against the vendor for financial loss.

A representative of the Program gave evidence that a meeting was held with Alan Silver and DeMillio on January 4, 1991 and that Silver provided the Program with copies of the Mutual Releases. The representative of the Program also indicated that a \$480,000 Letter of Credit had been posted with the Program as

security for the builder's obligations under the Ontario New Home Warranties Plan Act and that this security had been cashed by the Program in November 1990. At the meeting in January 1991, Mr. Silver indicated that 7 of the 19 units had executed Releases. In addition to those of the 4 Applicants, there were two Releases from Mr. Popov and from Mr. Winter, which individuals Mr. Sgro had testified were part of the Stratas International Inc. Investment Company as well as the four applicants in this appeal. The Program, therefore, dealt with other individuals who had made deposits, some of which have been settled at the time of this hearing.

The representative from the Program also indicated that apparently there is litigation in process with respect to settlements based upon forfeiture of deposits for failure to close. The representative from the Program was also concerned that basically these four Applicants were investors in the project and did not file claims with the Program until well after settlements had been effected with others. It is also to be noted that the Releases contained a direction to pay the \$2,000 deposits to the solicitor for the purchasers who was Alan B. Silver. No evidence was submitted to me to indicate whether any payment was made by Diton Construction (Ontario) Ltd. to Alan B. Silver and the Applicants furnished me with no information as to whether they had made inquiries of Mr. Silver as to whether monies had been received by him on their account and whether there was anything owing to him for legal fees. There is also in my view considerable confusion as to the participation of the Applicants in this project and as to their position with regard to the July 1990 closing. Coupled with the Mutual Release which Mr. Sgro testified he had discussed over the telephone with Mr. Silver, I am of the view that the Applicants do not have a valid claim against the builder as required under Section 14(1)(a) of the Act. In my view, given the knowledge which Mr. Sgro had, there was an obligation upon the Applicants to exercise extreme caution in signing any Release documentation in November and December 1990 no matter what counsel they may have been given by Mr. Silver. While it may be that the Applicants have some claim against Mr. Silver in his capacity as their solicitor, I find as a fact that their actions in putting Diton Construction (Ontario) Ltd. in the position where it could mislead the Program and their failure promptly to file any claim with the Program has brought upon them a loss of remedy which might otherwise have been available to them.

Therefore, pursuant to the authority vested in me under the Ontario New Home Warranties Plan Act, I hereby direct the Registrar of the Ontario New Home Warranty Program to disallow each of the claims of the four Applicants.

ANPROP INVESTMENTS INC.
 (now registered as RIVER OAKS DEVELOPMENTS INC.)
 and THE GREENHOUSES OF BRAMPTON I INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
 UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE REGISTRATION
 TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding

APPEARANCES:

THOMAS KELLY, representing the Applicants

NETANUS T. RUTHERFORD, representing the
 Ontario New Home Warranty Program

DATE OF 12 December 1991

HEARING: 22, 23 June 1992

Toronto

REASONS FOR DECISION AND ORDER

On this matter, there are only two issues to be considered by this Tribunal. The first is whether or not the tile supplied for the residence of one Dr. Barbalat was supplied by the builder or by the owner. The second is if the tile is found to be supplied by the builder and therefore warranted, was it defective bringing it within section 13(1) of the Act.

Addressing the first issue, we might refer to the builder's reasons for appeal to this Tribunal. They are:

The tile was selected, and, in that respect supplied by the purchaser not by the vendor or the vendor's trades; although the tile was installed by the vendor's trade, there is no allegation that installation of the tile was deficient.

It is conceded that installation of the tile is not in issue. The question is, who supplied it?

The evidence is that the house was built for one Dr. Barbalat under contract by the builder formerly known as Anprop Investments Inc. which has subsequently changed its name to River Oaks Developments Inc. and under the contract, the builder undertook to

supply and install the ceramic tile. The evidence of Dr. Barbalat who was called in reply indicates that prior to possession of the home in 1987, he had chosen a tile which the builder had on display in the sale's booth. Three or four weeks before closing, a Michael Gladman, tile contractor for the builder called him to say he could not get this tile and so he went down to the Rockford Tile (the builder's supplier, of which Gladman was the contractor) to pick out something else, but chose none since he found none to be satisfactory. He was advised the tile company could not guarantee how long it would take to find the tile he wanted and the builder refused to extend the closing date. As a result, he took the names of the several tile companies suggested to him by Rockford and eventually brought four or five different tiles to Mr. Gladman for approval, any one of which would have been satisfactory. He pointed out that Gladman chose one of them and it was subsequently installed.

Mr. Gladman in his evidence said he was the tile contractor operating Rockford Tile and the installer of the tile in the Barbalat residence. He observed that Barbalat came to the shop to choose from the samples, but the one chosen was not immediately available. He gave Barbalat a price range and directed him to a number of companies where he could choose tile. Having chosen one from Sole Tech, Dr. Barbalat returned to Rockford and Gladman approved it since it was within the price range and it was installed by Rockford.

The question then arises who supplied the tile. The evidence of both Dr. Barbalat and Mr. Gladman is fairly consistent and on these facts, we must conclude that the builder was the supplier within the contract between the parties. We are invited to find that the transaction falls with section 13(2)(a) of the Act, but cannot so find. The purchaser was bound to a certain price of tile within the contract. That is clear from the evidence of Mr. Gladman, the builder's contractor. The tile was approved by the contractor and we find no separate contract between Dr. Barbalat and Sole Tech where the tile was obtained. We, therefore, find the builder was the supplier of the tile and it was, therefore warranted under section 13(1)(a) of the Act.

The second issue is the alleged defect in the material. The tiles involved were installed in the kitchen, dinette, vestibule, hall, washroom and laundry room and were of two different shapes, square and hexagon. Shortly after taking possession, the owner found the tiles were chipping and brought it to the attention of the Program. During the first and second conciliation meetings, the Program's conciliator could not attribute a cause to the problem although it kept increasing. As Mr. Moffit the conciliator pointed out in his evidence, the damage was caused by chipping not cracking, the latter of which is usually caused by movement of the

floor. Chipping is usually the result of an impact of feet or the movement of furniture, but he said, it was not simply confined to the usual traffic areas, but all over -in all areas there was evidence of damage.

After the third inspection, the Program changed its position on the matter and ordered the builder to replace the tiles which appeared to be defective. Tests had been performed on the tile by Tekron Associates and a Mr. Edward Dunn, a technologist for 31 years with that company submitted his report. In his evidence, Dunn said his first impression was that chipping was caused by a delamination of the surface of the tile away from the body. He pointed out that there were two different things involved: the material and how it is put together. The material stood up well in the various tests, but when the microscopic test was used, there was evidence of a light coloured material between the glaze and the biscuit which had a granular appearance under the microscope. He said this has a negative effect on the result because the glaze has developed in strength under firing, but the granular layer would weaken the bonding between the glaze and the biscuit. This would be responsible for the delamination and, therefore chipping.

Under cross-examination by Mr. Kelly, Mr. Dunn said that along the edge of the tile tested the glaze had separated - chipped away. The problem was that the tile was showing chips and so the microscopic visual analysis was used. There is no test to determine the chipping resistance of the tile other than that. The tile, he said, was defective compared to perfect tile.

Ronald Grieve, President of Tekron Associates in his evidence said that he had been in the business for 35 years. He said that he had done what is known as the Tabor abrasion test in which the 4" tile was found to be satisfactory. In the shock resistance test, he found no deficiency in the tile. In the microscopic analysis, however, he found a granular graining between the biscuit face and glaze. He pointed out that the tile glaze and the biscuit must be compatible and if they are not what you get is an expanding of the glaze which is called crazing where the glaze contracts then you get a cracking in the glaze and this is called shivering. He made the analogy of the lack of primer paint on an automobile which results in the failure of the paint to bond with the metal. He continued saying that the tests proved conclusively that there was not proper firing of the tile and it was therefore defective.

We reproduce sections of the report of Mr. Grieve and Mr. Dunn respectively.

In the report of Mr. Grieve there is the following comment:

Our observations of the tile surfaces at this residence indicated that the tile in the

hallway, kitchen and laundry room is defective. The chips and spalls which were observed throughout these surfaces contrasted with other tiled surfaces in the house which are free of defects. The standard test such as wear index and thermal shock did not reveal the nature of the defect. The crystalline layer noted by Ortech International does however explain the nature of the inadequate durability of this tile. The presence of this layer weakens the bond between the glaze and the tile biscuit and will permit normal small impacts such as chair movement to gradually chip the surface.

As noted by Ortech this is likely to be a firing defect occurring during manufacture.

Based on our observations together with the results of the Ortech tests it is our opinion that the durability of the tile has not been caused by careless use and is a result of a manufacturing defect which has rendered this tile inadequately durable.

The test performed by Mr. E.J. Dunn came to the following conclusion:

RESULTS

The thermal shock test did not produce any negative result in the glazed tile.

The Tabor abrasion test produced a wear index (1a) of 104.2.

The microscopic examination of the section of the glazed tile revealed a very well defined layer between the mature glaze and the tile (ceramic) body. In appearance, the layer suggests an unmaturred glaze (i.e. glaze material which has not been fully converted from the original glaze frit composition applied to the surface of the ceramic tile). The layer is partially melted or sintered enough to stick well together, but has not been fused to a completely glassy state. The sintered layer is granular and weaker than the mature glaze. Thus, when impacted, the mature glaze delaminated from the weaker layer.

Figure 1 (Polaroid Photograph) illustrates the distinct layer between the mature glaze and the substrate ceramic tile body.

COMMENT

The nature of the failure of the tile would preclude its use. The cause of the failure appears to be the result of a manufacturing firing deficiency.

The evidence of the witnesses and the above reports can lead us to no conclusion other than that the tile was defective and not suitable for the purpose for which it was intended. We must, therefore, find that the Program was justified in ordering the tile to be replaced. The builder however did not accede to the Program's request and two quotes were obtained by the Program from Sterling Tile and Carpet at \$13,900 and Douglas Flooring Limited at a price of \$9,500. The Program chose the latter company and the tile was accordingly replaced in April 1990.

A demand has been made on the builder to reimburse the Program in the sum of \$11,270 constituting \$9,800 for the installation of the new tile and \$1,470 administration fee pursuant to section 17(1) of Regulation 726. No reimbursement has been made.

It has been conceded by Mr. Kelly on behalf of the builder that Anprop Investments Inc. is now registered as River Oaks Developments Inc. and Herbert Green is President of both this company and of the registrant Greenhouses of Brampton Inc.

There will, therefore, be an Order directing the Program to carry out its Proposals concerning both of these companies refusing or revoking the registration of each if within ten days of the release of this decision, the Program has not been reimbursed either by the builders or by the appropriation of the funds held to the credit of this matter in the Bank of Nova Scotia. Any excess funds represented by that security will be returned to River Oaks Developments Inc. formerly Anprop Developments Inc.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

DOUG BENNETT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
SELWYN CHARLES, Member
JOHN HURLBURT, Member

APPEARANCES:

DOUG BENNETT, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 20, 21 April 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a decision letter from the Program to the Applicant dated July 27, 1992. There are some unusual features to this hearing including the fact that there are certain other letters from the Program to the Applicant which had the effect of being decision letters and reference may be made to them. We shall not necessarily have to deal with them as such however, because the best approach to this case is to deal with a list of issues in the order in which they were presented.

This is the second occasion upon which an appeal from a decision of the Program concerning this same home has come before this Tribunal. On May 7, 1990, the Tribunal heard an appeal concerning four claims resulting from a conciliation done on November 12, 1988 and a re-inspection on March 22, 1989. The Tribunal issued an Order on June 12, 1990 allowing certain claims of the Applicant. Since that time there has been an almost continual history of discussions and negotiations among the Applicant, the Program and the builder Mitz Development Limited, inspections of the property, correspondence between the parties and attempts to settle these various issues. All of these efforts eventually proved unsuccessful which resulted in this hearing.

There is no doubt that the Applicant has had more than his share of trouble with deficiencies in his new home at 6546 Tenth Line West in Mississauga. An original list of deficiencies of some

71 items was submitted on February 1, 1988. Certain of these were of such consequence as to require the total re-bricking of the whole exterior of the house. The third paragraph of the Reasons for Decision and Order of the Tribunal at the first hearing reads:

The major concern that the Bennetts have is about the brickwork on their home. The builder has agreed to re-brick their home, now that they have chosen another style of brick since their original type which they would prefer is no longer available. Difficulties in reaching a decision on the choice of brick have resulted in a year passing by; however, the work as agreed by the builder and done under the protection of the Ontario New Home Warranties Plan is to proceed in the next few weeks.

This re-bricking was finally carried out, but with unusual difficulties. Not only was there a year lost as indicated in the earlier reasons, but so much difficulty arose between the Applicant and the builder (who never at any time tried to renege on its undertaking to re-brick the house) that the Program took the unusual step of taking the role of mediator between the parties to carry out the work upon which agreement was reached and on retaining an independent contractor (who has since become an employee of the Program) to oversee the re-bricking of the house on behalf of the Program.

A major difficulty encountered by both builder and the Program in dealing with the Applicant over a period of more than five years has been that, on numerous occasions when the negotiations reached a point when the builder or the Program believed an agreement had been reached, the Applicant would change his position in some way so that it was never finalized. Another major problem throughout, which continued into and, indeed, right to the end of the hearing before this Tribunal, was that, on numerous occasions, a proposal for settlement would be put forward dealing with a number of points or issues together, the Applicant would accept or agree to all but one or two and then proceed upon the premise that the other issues were settled. More than once at the hearing, the members of the Tribunal tried, as best they could, to explain to the Applicant that, when a Proposal or offer is put forward by one party to another there must be an acceptance by both parties of the same offer or some variation thereof before there is any binding contract reached and further that if an agreement is reached, conditional upon something happening in the future, the condition must be fulfilled before there is a binding agreement in place.

On June 11, 1990, the solicitor for the builder wrote the Applicant purporting to confirm the arrangements then made to proceed with the re-bricking, including choice of the new bricks and steps to be taken in carrying out the work and asking the Applicant to sign and return a copy of the letter to ensure that there were no misunderstandings between the parties as to what would be done. The Applicant did not sign the confirmation and so the work did not proceed. On July 23, 1990, the Program wrote a decision letter to the Applicant advising that it found the builder's position reasonable and in compliance with its warranty obligations. The Applicant responded by requesting an appeal from this decision on July 30, 1990, but he did not proceed with any appeal at that time. On September 17, 1990, the Program wrote the Applicant stating that if he did not give the builder written confirmation as to the details of the re-bricking and access to the property for this purpose, the re-bricking could not be commenced.

On May 15, 1991, the solicitors for the builder wrote the Program advising that the builder was still prepared to re-brick the house, but that the Applicant had some other issues he wanted to address and they would be meeting to try to resolve these. On June 4, the solicitors for the builder wrote the Program that they were very close to resolving the problems as Mr. Bennett had agreed in principle. However, no agreement was reached and Mr. Bennett again sought the assistance of the Program. By November of 1991, the Program had made progress to the point where it appeared to be agreed that it, the Program, would take over the arranging and supervision of the re-bricking, that Mr. Fortune of the Program would be in charge, that Mr. Thoburn, an independent contractor with expertise would be retained to oversee the actual work, that Uni-try Masonry was the company which the Program would bring in to do the actual work and that the Program will employ a general contractor to do any other work or make any repairs required as a result of the re-bricking. On November 15, 1991, a meeting took place at the premises at which were present Mr. Wheaton of the Program who was in charge of its file, Mr. Fortune, Mr. Thoburn, a representative of Uni-try Masonry and Mr. Bennett. This meeting did not result in the desired agreement of all parties, but did result in a letter of November 18, 1991 from Mr. Wheaton to Mr. Bennett which outlined a list of concerns expressed by Mr. Bennett as to the doing of the work and referred to another issue which had arisen by this time as to the obligation of the Program to pay the cost of Mr. Bennett and his family vacating the premises during the re-bricking. More will be said about this issue later.

Reference was also made to Mr. Bennett's submitting his choice of brick on November 18 indicating that this item outstanding since at least July of 1990 was still undetermined by Mr. Bennett. Finally, the letter indicated that a really bad relationship had developed at least between Mr. Bennett's and the builder's

representatives and perhaps others with whom he was dealing in this matter because, at the meeting, Mr. Bennett stated that if any more people entered his property without permission he would call the police and that if any damage occurred during the re-bricking, he would report the same to the police. Mr. Bennett responded by a letter of November 24, 1991 with a lengthy list of damaged items at his property apart from the brickwork and a number of issues concerned with the re-bricking.

On November 25, 1991, Mr. Wheaton wrote again to Mr. Bennett stating that it was obvious that an impasse had been reached and setting out an offer, on behalf of the Program, which it hoped would resolve this impasse. This offer involved the Program taking over all of the responsibility for carrying out the builder's warranty responsibilities and ending its relationship with Mr. Bennett which had broken down so badly. The letter then went on to set out in specific detail what the Program was prepared to do in removing the existing brick, replacing it with similar brick or an upgraded brick and mortar (in which case Mr. Bennett should pay an extra \$800), in having the work supervised by Mr. Thoburn, in offering something for the living expenses of the family away from the premises during the re-bricking, and of doing certain other work. The letter ended by asking for confirmation of Mr. Bennett's position concerning this offer as soon as possible. Mr. Bennett replied on November 29 that he would be getting legal advice as to his answer. On December 3, 1991, Mr. Bennett replied again stating that he had come to an agreeable solution of the problem with the builder and would be signing an agreement with it. He said that they would agree that the Program proceed with the work to be started in the following April of 1992.

On January 16, 1992, the solicitors for the builder wrote to the Program confirming the agreement it had reached with Mr. Bennett, namely that it would contribute \$25,000 towards the work which the Program would be proceeding to have done and would pay an additional \$2,000 directly to Mr. and Mrs. Bennett in satisfaction of certain claims of a contractual nature which Mr. Bennett had put forward and with which the Program had not apparently been concerned up to that time. The letter stated that before the builder would complete the agreement, it must receive a full and final Release from the Bennetts and a Certificate of Independent Legal Advice signed by both Mr. and Mrs. Bennett and ended with the statement that they would deal only through the Program and not directly with the Bennetts.

On January 22, 1992, the Program wrote to Mr. and Mrs. Bennett asking for a response to its November 25, 1991 letter and advising of the letter of January 16 from the solicitors aforementioned. On January 31, 1992, Mr. Bennett replied stating that he would not sign anything ("I do not support the fact that I am required to do

or sign anything with the Program because all work that is warranted has been addressed. This work is still incomplete.") He goes on to say that he would select the new bricks (not yet done), that he intended to move out during the re-bricking and claim \$1,440 (12 days @ \$120) for his expenses therefore and he proposed a further settlement as to four items of work which he would do himself for \$900 altogether.

On March 12, 1992, the solicitors for the builder forwarded the forms of Release and Independent Legal Advice to the Program and advised that they could release the \$2,000 to the Applicant as soon as they had obtained these documents completed from the Applicant and his wife. On March 20, 1992, the Program forwarded the documents to Mr. Bennett stating that as soon as it received them back completed, it would issue the \$2,000 cheque to him. Mr. Bennett did not have the documents signed or returned, but on April 6, 1992, wrote the Program stating, "It is understood that contract items are between the builder and myself and that all warranty work is the Ontario New Home Warranty Plan responsibility" and adding that he would be in touch to express other concerns.

The actual re-bricking of the house commenced on April 13, 1992 and was finished on April 27. It took two days to remove the old bricks and 12 days, because of bad weather to install the new bricks. It appears to have taken another two weeks or so to finish other consequential work. On May 13, 1992, Mr. Bennett wrote the Program complaining of quite a list of items consequent upon the re-bricking and one quite different item - defects in the garage interior wall, of which nothing had been heard for a long time although, apparently, it had been included in complaints made earlier (presumably one of the 71 mentioned at the outset) because no issue was taken by the Program that the complaint was made out of time. Reference is made to a meeting to take place on May 14, 1992.

On May 20, 1992, Mr. Bennett sent a handwritten FAX to the Program with lists of 11 items he proposed to complete and said "estimated time and materials \$500.00", 6 items he said the Program should undertake to do, 5 items of damage he said he would accept and went on to make some other complaints. The Program responded on June 25, 1992 advising that it would do what was necessary to correct nine items of complaint and that it would forward the \$1,440 for his expenses, the \$2,000 from the builder for the contract item settlement and an additional \$750 for claims made in Mr. Bennett's letter of January 31, 1992 to the Program for items of work performed by him at the house once he, Mr. Bennett, forwarded to the Program the various documents against which it had agreed or was instructed to make these payments. In the letter were enclosed another copy of the Releases which had been sent previously.

Mr. Bennett returned none of the required documents and on July 6, 1992 wrote again stating that not all of these concerns had been met and stating that it appeared a decision letter would be required to resolve a difference of opinion of outstanding work. He also asked for another inspection of his house. On July 27, 1992, the Program sent the requested decision letter in the following terms:



ONTARIO NEW HOME WARRANTY PROGRAM

2 COUNTY COURT BLVD., SUITE 435, BRAMPTON, ONTARIO L6W 3W8
PHONE (416) 455-0500 • FAX (416) 455-0169

July 27, 1992

Ref. No. 8115/278709

Mr. D. Bennett
6546 Tenth Line West
Mississauga, Ontario
L5N 5N1

Dear Mr. Bennett:

The Warranty Program had intended to complete the supervision of the rebricking of your home without the necessity of issuing another decision letter. Unfortunately you are continually submitting and withdrawing complaints. This has made it difficult for the Program to complete our obligations.

You had agreed, by your fax of December 3, 1991, to allow the rebricking of your home. The conditions under which this would occur were conveyed to you in my letter of November 25, 1991.

You had agreed to a cash settlement to undertake certain repairs on your home. You also agreed to accept an ex gratia cash settlement to help you defray the cost of relocating during the repairs. This was at your request as the Program felt that there was no health hazard present as you stated. You also settled with Geranium Homes for a cash settlement. This arrangement was made between you and the builder, independent of the Program.

The release forms were delivered to you and when you claimed that you never received one of the forms Mr. Stephens of the Program personally delivered new copies.

Prior to the start of the repairs, Mr. Thoburn, working on behalf of the Program, made an in-depth inspection of the interior and exterior of your home. This included videos which the Program has on record.

During the repairs the Program had a supervisor on site at all times to inspect repairs and to answer any concerns that you had.

Any damage that occurred was documented and then repaired. After the repairs to the home were complete, the inspection process was repeated and included inspections by the City of Mississauga Building Department.

You have reported in writing to the Program your remaining concerns. We are proceeding on the basis that the faxes of

July 6, June 22 (June 18), and May 25, 1992 contain all your complaints.

The following is the Program's position on these complaints. The Program recognizes that the work at your home is not complete and we are prepared to complete the following:

From your fax of July 6, 1992

No works to be undertaken.

From your fax of June 18, 1992

The replacement of two plants if they have died as a result of work undertaken by contractors of the Program.

From your fax of May 25, 1992 (May 20)

1. Any interior work as noted on the post-repair inspection. This will only be applying a bead of caulk to any window casings which separated from the wall.
2. The installation of two rolls of sod to the ground adjacent to the wall to the right of the rear entry door.
3. A box of bulbs to be supplied to replace any lost flower bulbs at the rear of the garage. This is supplied ex-gratia as no damage has been confirmed.
4. A cleaning of the garage to remove any accumulated dust from the repairs, noting that the garage was not in a clean state prior to the commencement of the repairs. We will vacuum only.
5. Cleaning of the stainless steel flexible chimney liner of any accumulated creosote even though your annual cleaning would have accomplished the same results.
6. The repaving of the driveway including that portion owned by the City of Mississauga. The driveway will be repaved up to the street curb.
7. The repairs to the joints of the eavestrough at the rear of the home.
8. The cleaning of the shingles adjacent to the wall of the house on the garage and around the chimney.

The Program is denying your claim for compensation on the following items. The reasons for denial are included.

From your fax of July 6, 1992

1. The City of Mississauga did not recognize any building code deficiencies in the construction of the block wall in the garage of your home. I refer you to the inspection at which you were present on May 14, 1992. There was no damage present due to defective materials used or poor workmanship. It was the opinion of both the City and the Program that the two loose bricks at the top of the wall were dislodged by mechanical means.
2. The damage to the door and window were not noted in any inspection by Program staff. The damage occurred when

there were no Program contractors on site. In your fax of May 20, 1992 this complaint was not of concern to you. However, the Program will deny this claim as the damage was not caused by the Program staff.

3. You agreed to have the wood that you had installed above the windows replaced with stucco board to match the balance of the house. This work was completed in a workmanlike manner.
4. Any plants that are dead as a result of the repairs will be replaced or you will receive compensation.
5. The air conditioner has been installed in a workmanlike manner.

From your fax of June 18, 1992

1. The brick in the area of the front bay windows was installed in a workmanlike manner. The installation of the windows dictated the placement of the brick.
2. The flashing around the chimney is installed in a workmanlike manner.
3. The mortar used in your house was mixed off-site to allay your fears of silica sand. The bricking of your home was carried out over a number of days, necessitating the use of multiple mortar batches. A variance in colour is unavoidable. As explained, if the mortar colour does not blend to acceptable tolerances then it will be stained to match. The efflorescence that occurred in the brick at the front entrance of your home is normal. If it does not disappear by natural weathering within a year, then it will be removed mechanically. There is no defect in materials used, poor workmanship, or building code violations.

From your fax of May 25, 1992

1. All plants were returned to their proper locations and placed in a manner that is in keeping with the original placement.
2. The gate operates correctly.
3. Water and electrical usage was negligible and not measurable. I point out here that during the bricking of the home Program staff accommodated your wishes for placement of additional electrical boxes within the brick.
4. It was your decision to store your car across the street in another person's driveway. The Program did not see the need to move the car. This was explained to you prior to the start of the work.
5. All exterior caulking is complete.

The above constitutes the Program's position on all complaints registered by you. The procedure for appealing a decision of the Program is outlined below. Should you wish not to appeal the Program has estimated that the necessary repairs would take one day to complete. Should you appeal, then we would require notice as to which individual items you are appealing.

.....

On September 18, 1992, the Program wrote again to Mr. Bennett:



ONTARIO NEW HOME WARRANTY PROGRAM

2 COUNTY COURT BLVD., SUITE 435, BRAMPTON, ONTARIO L6W 3W8
PHONE (416) 455-0500 • FAX (416) 455-0169

September 18, 1992

Ref. No. 8115/278709

Mr. D. Bennett
6546 Tenth Line West
Mississauga, Ontario
L5N 5N1

Dear Mr. Bennett

A meeting had been arranged for September 4, 1992 that you had to cancel due to other commitments. At that time we discussed that you would reschedule your appointment so that we could address some outstanding concerns with your home.

To date I have not heard from you. You acknowledged by telephone that you would be picking up a copy of the decision letter at your workplace that you had been late in picking up from the post office.

That letter contained the outline of the work that we were prepared to do to complete the re-bricking of your home. Much of this work is to be completed to the exterior of your home. We anticipate the duration of the work would be one day and wish to complete it during favourable weather conditions.

Would you please contact this office regarding your intentions to proceed with the repair by October 9, 1992. If we do not hear from you by that date we will be holding your file inactive.

Yours truly,


Jim Fortune
Client Service Rep.

Mr. Bennett responded by letter of October 5, 1992 advising that he would appeal the decision letter of July 27, 1992 stating it had been first received by him at an inspection of his house on October 2, 1992. The Program responded to this stating that it wished to clean up the whole file without the necessity of coming again to the Tribunal and said it would like to complete the remedial work that fall, but could not do so without specifics of the proposed appeal.

On October 14, Mr. Bennett wrote the Program making complaints against the conduct of certain Program officers, listing 14 items of appeal, 6 more items of repairs required and 7 more items of work he intended to do and make a charge therefor to the Program. He included a sentence, "I will seek compensation for the work after the appeal as I do not (believe) all items are covered by the Tribunal" and another sentence in which he said, "I feel at this point the Ontario New Home Warranty Program is not taking responsibility for their actions. This is causing me to be financially responsible which I will not accept." It is obvious from this letter that Mr. Bennett contemplated that this saga of disputes between himself and the Program and the builder, which have consumed so much time, effort and expense over so many years, would not come to an end even with this hearing before the Tribunal but would continue thereafter regarding these other items to which he intended to refer.

On November 20 Mr. Fortune, on behalf of the Program wrote to Mr. Bennett stating that it, the Program, was prepared to complete all work covered by warranty and in the letter it set out a specific list of nine items which it considered to be so covered. The letter pointed out that Mr. Bennett must allow entry to the premises for the workmen or the Program would not proceed with any of these repairs.

Further negotiations took place between the parties as the result of which Mr. Fortune believed that they had settled certain items and on January 27, 1993, he wrote to Mr. Bennett confirming an agreement for a cash settlement of \$939.68, being \$839.68 to replace a damaged liner in the chimney and \$100 for plants, sod and bulbs and enclosing a Release to be executed concerning these items. Again Mr. Bennett did not sign and return this Release, but wrote on January 28, 1993 stating that Mr. Fortune was misinformed and raising a number of quite different concerns. More correspondence took place and on March 13, 1993, Mr. Fortune wrote to Mr. Bennett as follows:



ONTARIO NEW HOME WARRANTY PROGRAM

2 COUNTY COURT BLVD., SUITE 435, BRAMPTON, ONTARIO L6W 3W8
PHONE (416) 455-0500 • FAX (416) 455-0169

FILE

March 13, 1993

Ref. No. 8115/278709

Mr. Doug Bennett
6546 Tenth Line
Mississauga, Ontario
L5N 5N1

Dear Mr. Bennett

Re: Your Fax March 2/93

The Program has attempted to resolve your file without the necessity of an appeal before the Commercial Registration Appeal Tribunal. To that end we have accepted a number of your claims for alleged damage and also have completed certain works ex gratia. This was done in good faith.

Nonetheless it has been necessary to issue a decision and allow you an appeal before the Tribunal. At the hearing the Program will argue that you are only entitled to that which is covered by the Act. We will not necessarily continue to offer any previous commitments that we have made to you. These commitments were made to resolve your file not to allow you to continue to negotiate a better settlement.

You wish more ex gratia payments in return for dropping certain outstanding issues before the Tribunal. This is unacceptable to the Program and we will proceed with the Hearing arguing that you are only entitled to that which is covered by our Act.

Yours truly

J. Fortune

Jim Fortune
Client Service Representative

/is

c.c. Stephen P. Martin, Legal Counsel

At the outset of these reasons, we noted that the Applicant has had more than his share of difficulties with deficiencies in his home and, having outlined the difficulties involved in dealing with these, we would also note that the builder and the Program have had more than their share of difficulties in trying to resolve the Applicant's claims.

At the hearing, counsel for the Program very strongly took the position that pursuant to the provisions of the Ontario New Home Warranties Plan Act, and the Regulations made thereunder and pursuant to all of the documentation and other relevant evidence given at the hearing, the Tribunal should now deal with all outstanding issues between the parties and that this decision should, subject to any appeal which may be taken therefrom, make a final determination of all outstanding rights and obligations between the parties. The Tribunal indicated to Mr. Bennett that it might well agree with this submission and that he should, therefore, put forward all of the claims which he has against the Program and present all of the evidence he has in support of them. The importance from his point of view of his doing this was impressed upon him by the Tribunal on a number of occasions as was also the fact that certain items which had been the subject of tentative agreements for settlement previously, which settlements had never actually been the subject of final agreement between the parties, was still in dispute or issue and that his entitlement to recover the same or damages in lieu thereof depends solely upon the merits of his claims and that he could get no assistance from the fact that a tentative agreement may have been reached with regard thereto which agreement was never finalized for some reason or other. To allow the Applicant to carry on this dispute with the Program beyond this hearing and decision (except for a possible appeal from the decision as provided by legislation) would indeed, be an abuse of the procedures laid down by the Act and the Regulations and an abuse of the process of this hearing.

There will, therefore, be a final determination herein of each of the issues or claims put forward by the Applicant. We shall deal with them in the order in which they were originally presented to us by the Applicant. The first of these were the first four numbered items listed in Exhibit 7.

1. Deficiencies in the interior brick and block garage wall - It was the evidence of the Applicant that there was an overhang of this wall over its foundation wall of 1 1/2" to 2" for about one-half of its length and that this should have been supported underneath by an angle iron. Mr. Mark Sraga, Senior Building Inspector for the City of Mississauga, had inspected this wall and gave evidence as to its condition. The overall length of the wall is about 20' and the length of the part of the bottom of the block veneer wall which overhangs the foundation wall is 4' to 5'. This

results from the foundation wall not being plumb at this part. Mr. Sraga said that it is important to note that this part of the wall where there is excessive overhang is near the front door and therefore presents a considerably less serious hazard to its stability than it would do if it were in the middle. This evidence was corroborated by that of the witnesses from the Program. It was Mr. Sraga's opinion that although the overhang for the distance indicated was there and constituted a breach of the Ontario Building Code, its extent and position along the wall, coupled with the fact that it had been in place for several years without having any negative results, led him to the conclusion that it has resulted in no damage to the owner and does not constitute any breach of warranty on the part of the builder. This position is further supported by a letter dated October 22, 1992 to the Applicant from one Mr. D.T. King, Manager, Building Inspection Section, Plans and Development Department of the City of Mississauga which was tendered by the Applicant as Exhibit 12 at this hearing and which reads in part:

Our records indicate that you have now occupied this house for over five years and during that time period, the garage walls have performed satisfactorily with no reported signs of deterioration or other problem. In addition, a number of our inspection staff have inspected your garage, specifically to look at the item referred to in your letter.

These inspections have confirmed the garage is not unsafe, and that it is in reasonable conformity with the requirements of the Ontario Building Code, with the exception of the few loose bricks near the peak of the roof. Although these loose bricks, in our opinion, are not in danger of falling, and do not present an unsafe condition, we feel that they should be re-mortared into place.

The Tribunal finds a preponderance of evidence in support of this conclusion and that the Applicant has not proved his claim based upon this overhang.

The next claim with regard to this interior brick and block wall concerns the few loose bricks near the top of it to which reference was made in Mr. King's letter. The witnesses for both parties agreed that they were loose. It was the evidence of the witnesses for the Program that this condition did not result from poor mortar or poor workmanship in installing these bricks in the first place, but that they had been dislodged by some external force applied to them. We have no evidence whatever as to what

that was or who was responsible for it. Mr. Bennett gave evidence that this defect had not been repaired and the evidence on behalf of the Program was to the effect that it was supposed to have been repaired and should have been but did not go so far as to say that it was. While this is a small item, the Applicant is entitled to have it repaired properly and the Tribunal will direct the Program to have a qualified person check it and if it requires remedial work to have the same done.

The next claim with regard to this wall is that it is not properly gas-proofed to prevent fumes from the garage from entering the house. The best evidence we have on this question is that of Mr. Sraga, given in chief, when he said that there was a question of this and there should be a proper investigation made and if the wall be found not properly gas-proofed, the necessary steps shall be taken to make it so. Upon this evidence, the Tribunal will direct the Program to have a qualified person make this test and if remedial work be found necessary to have the same done.

The final claim concerning this wall concerns whether the block veneer wall is properly tied to the frame of the building behind it. It was the evidence of the Applicant that if one pushed at the face of this wall from inside the garage there was too much give to it indicating an absence of or too few brick ties or whatever method is used to tie them together. The witnesses for the Program did not concede this defect, but did not give any evidence that it did not exist and the Tribunal will therefore make the same direction with regard to it, namely that the Program have a qualified person check it and, if remedial work is required, have the same done.

2. Dead Plants Including Placement - The re-bricking was done of the whole house and the Applicant claimed that this resulted in the destruction of certain plants and shrubs at various places around the house. It was his evidence that two shrubs died originally and that three more died subsequently and one juniper bush is badly damaged and likely to die so that he has five dead and one damaged. It was the evidence that before the re-bricking operation was commenced, the shrubs were dug up and replanted in another place on the property from which they could be returned to their proper places after the work was done. The evidence also indicated that the first two died almost at the beginning and it is a fair inference that this resulted from something wrong being done with them for which the Program should be responsible. With regard to the others however, it is not true that their demise resulted from fault on the part of the Program or any party for which it is responsible. A perusal of the correspondence and of the evidence of the complaints concerning these shrubs shows that these complaints as to the numbers affected kept increasing as time went on from the original two up to the final six.

3. Air Conditioner Installation including electrical installation - Exhibits 15A & 15B are photographs which show the installation of the air conditioner on a metal frame or bracket on the exterior of the house. Of course, to re-brick the wall behind it, it had to be removed and reinstalled after the re-bricking was finished. It is the complaint of the Applicant that it was not put back in the same place, but is out of position by 2" to 2 1/2", that it was not as level as it should be and, therefore, does not operate properly and that the electric cable providing power to it was not spliced properly when it was re-installed. The Applicant subsequently agreed that it is now operating properly. Mr. Fortune, on behalf of the Program said that he inspected the splicing of the cable and found nothing wrong with it. He said that the air conditioner is operating properly and the Applicant has no damage with regard to this item.

The Tribunal finds that the Applicant has not proved any claim under this heading.

4. Cedar wood above windows and doors - Originally when the house was constructed, there were installed above the windows and doors and the garage door white masonite sheets or panels. As an upgrade, Mr. Bennett had had these replaced, before the re-bricking of the house, with cedar wood boards or panels. These were made of tongue and groove, dressed cedar. Mr. Bennett told us that when the panels were replaced after the re-bricking, the cedar wood was not put back over the windows and doors in the house. It is still in place on the garage. He said that he told the Program that he wanted the cedar wood back, but he was not certain to whom he made this request. At first, he said it was Mr. Thoburn but later he said it was someone else. It was Mr. Thoburn's evidence that Mr. Bennett told him that he wanted the masonite or stucco board put back. While there is real confusion in the evidence on this point, the Tribunal finds that the probability is that Mr. Bennett did want his cedar lumber back. He paid for this upgrade in the first place and there is nothing in the evidence to suggest a reason for a change of mind. There is some corroboration for this conclusion to be found in the fact that in a letter of March 1, 1993, written by Mr. Bennett to Mr. Fortune (last document in Tab 16 of Exhibit 6), he says:

I have obtained the following estimates and
propose I complete repairs

.....
3 - Cedar wood - above windows = \$200.00

In the argument dealing with this item, it was the alternative submission of Mr. Austin that the amount of damages recoverable for this item should be the \$200 mentioned. The Tribunal has concluded

that Mr. Bennett should be allowed this \$200.

The next items presented by Mr. Bennett were the second list of six numbered in Exhibit 7.

1. Sod and bulb replacement - Regarding these items, Mr. Austin indicated that the Program is offering to the Applicant 50 flower bulbs or a cash settlement of \$15.00 and for the sod, the replacement of two rolls of sod at the back door at \$3.00 or the total sum of \$6.00. The Tribunal finds this offer reasonable and will direct the Program to pay the Applicant this \$21.00.

2. Driveway repairs - This claim is that the driveway into the home was damaged by the re-bricking operations. Mr. Bennett's position was that he is entitled to what was set out in the Program's decision letter to him of July 27, 1992. On page 2, it is stated:

The following is the Program's position on these complaints. The Program recognizes that the work at your home is not complete and we are prepared to complete the following:

.....
From your fax of May 26, 1992 (May 20)

The repaving of the driveway including that portion owned by the City of Mississauga. The driveway will be repaved up to the street curb.

The Program agrees that it has responsibility with regard to this item and in argument, Mr. Austin offered that the Program would pay up to \$747 including taxes against proper receipted invoices for this work. The Tribunal finds that the Program has been reasonable throughout on this item and will direct that, at its option, the Program should either have these repairs made or pay to the Applicant up to \$747 against proper receipted invoices.

3. Back Eavestrough Replacement - The carrying out of the re-bricking operations resulted in the replaced eavestrough having two joints not properly finished. In its letter of July 27, 1992, quoted above under the item for driveway repairs, the seventh numbered item added in the same paragraph reads:

7. The repairs to the joints of the eavestrough at the rear of the home.

In his argument, Mr. Austin said that the Program was prepared to carry out this item or allow a cash allowance of \$150 which seems sufficiently generous here.

4. Shingle Repair and Cleaning - Mr. Bennett complained of mortar spilled on the roof and of two or three broken shingles. The evidence established that, with the passage of time since the re-bricking the mortar on the roof has been washed away. Mr. Fortune climbed up and examined the broken shingles when he inspected after the re-bricking and saw that the breaks were not recent. Upon all of the evidence on these items, the Tribunal cannot find a case made out by the Applicant.

5. Brick Wall Cleaning and Mortar Colour - The Applicant claimed there was discolouration of the mortar in the front wall of the house as re-bricked and efflorescence on the brick which caused discolouration as well. Mr. Fortune spent some time dealing with this claim at the premises and at this hearing. He took some photographs which became Exhibits 19A, B & C on April 7, 1993. These were taken from the sidewalks (because of Mr. Bennett's threat against people who came on his property without permission) and from this distance show no discolouration whatsoever. It was Mr. Fortune's evidence that at the time of his first inspection of the wall, he did see efflorescence but he thought it would wear off which it has done and he thought the mortar colour would come to blend in more and more which, in fact, it has done. He said that it is now quite acceptable. The Tribunal finds Mr. Fortune's evidence, corroborated by the photographs, to be the preferable evidence here and that the Applicant has not established this claim.

6. Chimney Flashing water leaks - The Applicant said that after the re-bricking, water leaked from this chimney. However, Mr. Bennett in his own evidence, said that, as a result of his complaints, the Program had someone come and put caulking around the flashing and it has not leaked since that time. This appears to dispose of this item.

In addition to these numbered items in Exhibit 7, the Applicant put forward some additional claims.

1. Claims for Moving Expenses - In the outline of the background facts earlier herein, we dealt at some length with the history of this claim. Mr. Bennett's claim herein is really based upon his allegation that he had an agreement from the Program to pay him \$1,440. A proper analysis of the evidence and the documents show that he never had such an agreement. All of the offers on behalf of the Program in this respect were contingent upon certain agreements being reached, none of which were ever actually reached so there never was a contractual obligation upon the Program to pay this item. The Applicant therefore can only recover upon this item if he can show damages in this respect necessarily resulting from a breach of warranty on behalf of the builder.

It was the evidence of the witnesses on behalf of the Program that it was not necessary for Mr. Bennett and his family to move out during the re-bricking and that on other occasions when it has been found necessary to re-brick houses, it is customary to carry out this work without the Applicants having to move out. Mr. Bennett said that he believed that silica in the mortar in the wall to be torn down would damage his family, but he had no other evidence except his own opinion on this point. Mr. Bennett's proof of damages on this item was also unsatisfactory. His evidence was that he rented a cottage up on Lake of Bays for two weeks for \$500 a week and that they had other living expenses which brought the total up to the amount claimed. He had no receipts, no invoices and no cancelled cheques. The Tribunal finds that the Applicant did not establish his claim under this heading.

3. Claim for a New Chimney liner - The Applicant is claiming \$839.68 for a chimney liner. The Applicant set out this claim in a handwritten letter of November 20, 1992 to Mr. Fortune (part of tab 16 of Exhibit 6) claiming \$675 plus G.S.T. plus P.S.T. plus an inspection cost of \$63.13. On January 27, 1993, the Program offered to pay him \$839.68 in return for a Release. A Work Schedule 6 was attached to the Release which stated:

Payment of \$839.68 to replace existing damaged stainless steel one piece wood stove liner.
Installation to meet applicable codes.
Inspection costs borne by homeowner to be included in cash settlement.

The Applicant refused to sign the Release so the arrangement was never made. On cross-examination at this hearing, Mr. Bennett said that he did not get the required permit from the municipality to have this work done, he had no receipt and no cancelled cheque. He said that his wife dealt with the man (the man who he said did the work). She paid him in cash and did not get a receipt. He did not give us any name for this man. The Tribunal wishes to note that at the time Mr. Bennett was giving this evidence his demeanour appeared somewhat evasive and he appeared somewhat less at ease than during most of his evidence and the Tribunal does not accept his evidence on this point. Altogether the Tribunal finds that the Applicant did not establish this claim and it should be disallowed.

4. Claims for work which the Applicant did personally or had done in the house - There was evidence of negotiations concerning various items included under this heading over a considerable period of time. The issue here, however, comes down to an agreement between the parties evidenced by Exhibit 18 being another draft and unsigned Release and Work Schedule 5 attached thereto which reads:

\$750.00 is for the following work to be undertaken by the homeowner

- \$250.00 for all exterior painting on the lower level of the house.
- \$250.00 to replace all exterior wooden trim on the house - 160 ft. of wood including the removal of the lattice work.
- \$250.00 to remove and re-install 6 (six) light/electrical fixtures. Includes the removal of air conditioner and cables, but not re-installation of same.

At the conclusion of the hearing, counsel for the Program confirmed the Program is still prepared to pay the \$750 when it gets a full and final Release.

5. Claims for missing contract items - Under this heading, the Applicant was complaining as to the design of his main stairs in the house, that there should have been some windows at the side of the front door and that he should have had a double chimney and only got a single one.

It was the position of the Program that these were matters of contract between the Applicant and the builder and nothing pertaining thereto constituted any breach of warranty under Section 13 of the Act to support any claim at this hearing. The Applicant appears to have recognized this when he wrote a letter on April 6, 1992 to Mr. Fortune (the last sheet in tab 12 of Exhibit 6) in which he said in the second paragraph: "It is understood that contract items are between the builder and myself and that all warranty work is the ONHWP responsibility." Therefore, nothing can be allowed to the Applicant on this claim.

Therefore, pursuant to the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program herein:

- 1) to have a qualified person make an inspection of the two bricks which are alleged to be loose in the interior garage wall and, if remedial work is found to be required to have the same done;
- 2) to have a qualified person make an inspection to determine whether or not the interior garage wall is properly gas-proofed to prevent fumes from entering the home and, if remedial work is found to be necessary to have the same done;

- 3) to have a qualified person make an inspection to determine whether the interior brick and block veneer wall in the garage is properly tied or fastened to the frame of the building and, if remedial work is found to be necessary to have the same done;
- 4) to replace two shrubs which the Tribunal found, set out above, were destroyed in circumstances for which the Program is responsible;
- 5) at its option, either replace the cedar wood panels above the doors and windows or pay to Mr. Bennett, the sum of \$200 in lieu thereof;
- 6) with regard to the sod and bulb replacement to pay Mr. Bennett the sum of \$21 being the cost of the bulbs and the two rows of sod mentioned above;
- 7) with regard to the repairing of the driveway, the Program at its option should either have the driveway repaired or pay to the Applicant a sum up to \$747 against proper invoices provided by a contractor who has done this work up to a total of \$747 including taxes;
- 8) with regard to the repair of the eavestrough joints either, at its option have these repairs carried out or pay to the Applicant the sum of \$150 in lieu thereof;
- 9) with regard to the claims for which the Applicant did personally or had done on the premises, the Program should pay to the Applicant the above-mentioned sum of \$750;
- 10) with the exception of the foregoing, all of the claims by the Applicant against the Program should be disallowed;
- 11) with regard to the items above concerning which the Tribunal has directed the Program to have someone enter upon the premises to make inspections or to do remedial work, the Tribunal directs that the Applicant must allow proper persons to enter upon his premises for this purpose and, if he does not permit this to be done, the Program shall have no further responsibility to him regarding such item or items;
- 12) with regard to the items above in which the Tribunal has directed the Program to make payments of money to the Applicant, the Tribunal further directs that the Program will only be responsible to do so after it has received from the Applicant and his wife Releases in proper form duly executed by them.

LOUIE AND LIZ BILOBRK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES:

MR. AND MRS. L. BILOBRK, appearing on their own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 17 December 1992

Toronto

REASONS FOR DECISION AND ORDER

The claim by the homeowner is with respect to 12 items which have been disallowed by the Ontario New Home Warranty Program (the "Program") and which total \$7,540 by the estimates of the homeowner.

The evidence before the Tribunal indicated that a house had been constructed in Stoney Creek, Ontario and although partially completed, the transaction did not close. Accordingly the builder entered into an Agreement of Purchase and Sale with Mr. and Mrs. Bilobrk under date of October 12, 1990, which Agreement of Purchase and Sale was to close on November 30, 1990 and, in fact, did so close. The Agreement of Purchase and Sale was for \$255,000 with a \$2,000 deposit and was relatively sketchy in detail. It indicated that there were to be eleven french doors, a roughed in central air and central vacuum system and attached was an Appendix "A" setting out seven items dealing with correction of defects, installation of light fixtures, finishing of bathrooms and closets, sodding and installing a gas fireplace. Possession occurred on November 30, 1990 and the first complaint to the Program was filed April 24, 1991 within the first year. In that complaint, Mr. and Mrs. Bilobrk indicated that the builder had requested them to defer a complaint in respect to completion of their home while he finished another home. In that complaint, the Bilobrks identified the fact that nothing happened regarding the deficiencies and that

Mr. Bilobrk met with the builder and his agent on April 13, 1991 when he was informed that the builder was in bankruptcy. As a result, Mr. Bilobrk produced a Schedule dated April 15, 1991 and forwarded it with his complaint to the Program.

Subsequently, a conciliation took place on July 11, 1991 in which 37 items were determined to be warranted.

On September 5, 1991, Mr. Bilobrk advised the Program that the builder had not attended and forwarded a list dated August 30, 1991 of 15 items which Mr. Bilobrk claimed to have been included in the Agreement of Purchase and Sale. This Agreement of August 30, 1991 was signed by the Bilobrks and the builder and purported to be an acknowledgement that the builder had agreed to the 15 items set out therein as being part of the purchase price. This Agreement was signed by Mr. and Mrs. Bilobrk and the builder. On October 17, 1991, the Program responded to the homeowners advising that eight of the fifteen items were not warranted because the letter "although signed by the builder, is a confirmation of verbal promises made by the builder and cannot be considered as formal amendment to the contract". If in fact the builder was in bankruptcy at this time, the Tribunal is of the view that he would have no authority to execute such an Agreement to create a retroactive addendum to the Agreement of Purchase and Sale.

The items in the complaint of the homeowner dated September 5, 1991 containing the purported Agreement of August 30, 1991 which the Program held to be warranted were the screens on the windows and patio door, topsoil and sod in the front yard (which had been included in Schedule "A" to the original Agreement of Purchase and Sale), windows to have closing handles, trim work to be completed; french doors for the living room; master bedroom light fixture to be repaired or replaced and cracked window in the middle bedroom to be repaired. The balance of the items, seven in number, were disallowed and will be dealt with by the Tribunal in assessing the claims presented at this hearing.

Additional complaints were delivered to the Program under date of November 29, 1991, again within the first year of possession. A further conciliation occurred on November 15, 1991 in which 43 items were identified as being warranted and subsequently, the items contained in the homeowner's complaint of November 29, 1991 were also reviewed and dealt with by the Program. As a result of these conciliations and assessments, after appropriate tender procedures, contracts were let by the Program, one for \$13,300, the second for \$13,700 and the third for \$9,325 for a total of \$36,325 plus GST.

Evidence was presented to the Tribunal by the Program's contractor that the work contained in these contracts was

completed. In addition, one item in the November 29, 1991 list identified in addition to the work agreed to be done in the third contract that the homeowner wanted compensation for repairs to the ceilings in the master bedroom and the den and an allowance for the cleaning of the rugs and an allowance for suit and dress cleaning in an amount identified as being \$2,600. Presented in evidence to the Tribunal was a copy of a cheque for \$2,600 issued to the homeowners and a Release executed July 5, 1992 in the amount of \$2,600.

Subsequently on July 24, 1992, the homeowner complained about roof leakage which the Program found to be warranted and had the contractor complete for an additional \$2,100 plus GST. In all, more than \$43,000 was paid out by the Program for contractual work plus GST plus the cash settlement to the homeowner.

Before proceeding further with the homeowners' complaints before this Tribunal which were twelve in number, it should be noted that in the course of the evidence Mr. Bilobrk informed the Tribunal that he was an accountant and that over the past ten years he had bought and sold eight houses. Mrs. Bilobrk identified to the Tribunal that she was a real estate agent and, in fact, was one of the agents on this transaction and received part of the sales commission. The Tribunal does not, therefore, accept the evidence of Mr. and Mrs. Bilobrk that they relied on the oral representations of the builder to complete all of the items which appeared in the subsequently signed Agreement of August 30, 1991. The Tribunal is of the opinion that having heard Mr. and Mrs. Bilobrk and observed their demeanour on the hearing they were quite knowledgeable and experienced purchasers of real estate and knew what should reasonably have been included in the Agreement of Purchase and Sale if they subsequently wished to rely upon the deficiencies which they claimed in their filing with the Tribunal dated December 16, 1992.

Accordingly the Tribunal reviewed the twelve items set out in the claim and came to the following decision. The first three items totalling \$740 related to an allowance for rug cleaning and scotch guarding, allowance for suit and dress cleaning and heat and air vent cleaning. The oral evidence before the Tribunal was that Mr. and Mrs. Bilobrk had their carpets cleaned and scotch guarded when they took possession. They indicated that as a result of the extensive repair work undertaken by the Program's contractor, the rugs were soiled and needed to be cleaned and scotch guarded.

Evidence on behalf of the Program was to the effect that the Program's contractor had engaged the services of a cleaning woman who spent a day and a half cleaning after the completion of the repairs by the contractor and further testimony by a witness

for the Program, was to the effect that it would be unnecessary to re-scotchguard the rug at this time. The claim with respect to suit and dress cleaning, was that the Program's contractor failed to remove the homeowner's clothing from the master bedroom walk-in closet and as a result, dust from the repairs penetrated the clothing. No evidence as to expenditures for cleaning was produced by the homeowners, however, before this Tribunal. It is also to be noted that these items were included in the November 29, 1991 list of outstanding items filed with the Program for which there was a notation that \$2,600 would be cash settled in respect to these items and the repairs in the ceilings in the master bedroom and den. A release of the Program was signed by the homeowners in respect to these items.

There was evidence that there may have been some debris in the heating and air vent system. Much of this presumably was caused by the original builder, but in any event the Tribunal is of the view that a minor allowance of \$100 would be appropriate to compensate the homeowners in respect to this item.

Item 4 pertained to mullion bars insufficient for the entire house. Evidence before the Tribunal indicated that these, in fact, are muntin bars which are of a decorative nature and which normally are placed on windows located on the front elevation only of a new home. The homeowners argued that the muntin bars should appear on all windows, that only the front windows had been completed with muntin bars. The representative of the Program and the Program's contractor both testified that the number of muntin bars in the basement which were required to be painted and installed exactly totalled the number to complete the front elevation windows. In view of the fact that there were neither more nor fewer than such number of muntin bars left by the builder in the basement at the time of closing, the Tribunal finds that this claim has not been proven by the homeowners and disallows the claim.

Item 5 - The homeowner acknowledged that a french door had been installed between the living room and foyer, but that it was in plain glass and not bevelled glass. The testimony before the Tribunal was that the considerable number of french doors in the home were all plain glass. The Agreement of Purchase and Sale did not identify that there would be one special set of doors which would contain bevelled glass. The Tribunal therefore cannot accede to this claim by the homeowners.

Item 6 - The homeowner identified a request to install two 2 1/2 horsepower garage door openers. This came from the Agreement subsequently executed on August 30, 1991. In view of the fact that this was not an item specifically identified in the

Agreement of Purchase and Sale, the Tribunal finds that the homeowner cannot assert this claim against the Program.

Item 7 - The homeowner again referring to the August 30, 1991 Agreement required oak wall-to-wall panelling on each side of the fireplace in the amount of \$1,500. The Agreement of Purchase and Sale specifically makes reference to the location and installation of a fireplace in the family room in Appendix "A" to that Agreement of Purchase and Sale. No reference to wall-to-wall panelling is identified in that Agreement of Purchase and Sale or in the Appendix thereto and accordingly the Tribunal cannot agree to this claim asserted by the homeowner.

Item 8 - Reference by the homeowner was to bathroom mirror, towel rack and toilet paper dispenser not having been installed and an allowance of \$500 to be given to the homeowner by the builder. This item was specifically identified in the Agreement of August 30, 1991 by the homeowner and builder. The Tribunal notes that in clause (e) of Appendix "A" to the original Agreement of Purchase and Sale the vendor agreed to "finish bathrooms... throughout house..." While this does not specifically refer to the items which the homeowner is claiming, the contractor for the Program identified the fact that there were no mirrors, towel racks or toilet paper dispensers in any of the three bathrooms. He also indicated that the cost of modest installation of these items would amount to the \$500 that the homeowner was claiming. In the opinion of the Tribunal, this is an item which should have been provided by the builder or specifically exempted from the Agreement of Purchase and Sale.

Item 9 - The homeowner claimed for a second floor main bathroom to have oak matching medicine cabinet over the toilet, again reflecting an item of the August 30, 1991 Agreement. No reference was made to this item in the Agreement of Purchase and Sale or its Appendix and the Tribunal cannot agree with the submission of the homeowner in this regard.

Item 10 refers to the installation of an alarm/security system with all of the equipment relating thereto. The homeowner identified the fact that wiring was installed, but no equipment was hooked up to such wiring. This is a major item for which the homeowner is claiming \$1,500 and it would seem to the Tribunal that if this were to be an included item it could easily have been identified in the Agreement of Purchase and Sale, in particular in Appendix "A" to the Agreement. In the absence of its inclusion in that Agreement of Purchase and Sale, the Tribunal is not prepared to accept the purported amending Agreement of August 30, 1991 in respect to this item.

Item 11 refers to a shower door on the first floor bathroom. The homeowner identified the fact that a shower stall had been constructed in the first floor bathroom, basically identical to that in the master bedroom ensuite which latter shower stall had a door. The homeowner testified that there was neither a door nor a shower curtain rod installed in the main floor bathroom. The Program's contractor confirmed this information. While the Program argued that the most the homeowner could claim would be for a shower curtain rod, the Tribunal is of the view that in a house of this size and value, in the absence of some specific exemption in the Agreement of Purchase and Sale, it would be appropriate that a shower door be installed in this first floor bathroom. The contractor for the Program confirmed that the cost claimed by the homeowner of \$400 would be reasonable for the installation of a shower door.

Item 12 - The homeowner claimed for an interior light fixture allowance of \$1,500 which comes directly from the Agreement of August 30, 1991. In the opinion of the Tribunal, this is also an important item which should have been clearly identified in the original Agreement of Purchase and Sale and the fact that it was not and, in fact, the acknowledgement by the homeowners on this hearing that builder's light fixtures had been installed, the Tribunal finds that this item has not been proven as being part of the Agreement of Purchase and Sale and is not therefore warranted.

On the basis, therefore, of all of the evidence presented to the Tribunal and in particular, the careful and honest assessment by the Program's contractor, the Tribunal is of the view that the homeowners should be allowed the sum of \$100 for cleaning in items 1, 2 and 3 of the homeowners' claim. The Tribunal also is of the view that item 8 for \$500 with respect to completing the three bathrooms is an appropriate item for the homeowner to receive and that item 11, the shower door in the first floor bathroom in the amount of \$400 is also an appropriate amount for the homeowner to receive.

Pursuant to the authority vested in it under the Act, therefore, the Tribunal hereby directs the Program to pay the sum of \$1,000 to the homeowner in full settlement of the items claimed by the homeowners before this Tribunal and as filed under date of December 16, 1992 and directs the Program to disallow all other items set out in that said claim.

CARLA BRADBURN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
EDWARD WEISZ, Member

APPEARANCES:
ROBERT J. BANIK, representing the Applicants

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF 12 November 1992
HEARING: 9 February 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program ("the Program"), rendered April 22, 1991 disallowing a claim in damages by the Applicant based on Section 19(1) of the Regulations of the Ontario New Home Warranties Plan Act.

The relevant provisions are as follows:

19-(1) Every vendor of a new home of a type referred to in subclause 1(d)(i) or (ii) of the act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

(a) the date originally fixed for closing the purchase agreement; or

(b) an extension referred to in clause 3(a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

.....
19-(3) Subject to paragraph 5 of the Addendum

referred to in paragraph 12 of section 1 of Regulation 728, subsection (1) does not apply where,

- (a) the vendor extends the closing beyond the original closing date after giving written notice to the purchaser at least sixty-five days before the original closing date; or
- (b) the vendor extends the closing for not more than fifteen days beyond the original closing date or beyond the extended closing date referred to in clause (a) after giving written notice to the purchaser at least thirty-five days before the original closing date or the extended closing date referred to in clause (a).

19-(4) Where a claim is made under subsection (1), compensation shall be calculated from the original closing date or the closing date as extended under clause (3)(a) or (b).

The Applicant claims that the vendor did not close on the date fixed or within the legal delays fixed by the Act and for this reason is responsible for damages she suffered.

The Program, in rejecting the claim, argues that it is due to the Applicant that closing did not take place within the delays fixed, so that the Applicant is the author of her own misfortune; the Program also argues that in any event, the Applicant agreed to the extension of delays for closing and, therefore, is not entitled to make a claim under Section 19 of the Regulations.

Both parties stipulated that the claim was made within the one year period allowed by the Act.

The first witness to testify was Mrs. Bradburn, the Applicant, who stated that she and the vendor had entered into an Agreement for the purchase of a home which was to be constructed for her. The Applicant made a deposit of \$20,000 together with the Purchase Agreement. The Agreement, produced in Exhibit 4, tab 1, was dated March 28, 1989 and fixed the closing date as August 17, 1989.

The Applicant testified that the transaction did not close on the date fixed. Approximately two weeks before closing, she noticed a sign on the door of her home saying that a minor variance was being applied for. This was necessary because of her home being constructed 2 feet too close to the property line in one corner of the lot.

When the Applicant discovered that the application was being made, she felt directly affected. She feared there might be a problem with the Fire Department having access to her property in the case of an emergency. She, therefore, went to the hearing of the Committee of Adjustment where her neighbour contested the variance being sought by the vendor. The Committee of Adjustment rendered judgement dated July 6, 1989 refusing the minor variance; the builder appealed to the Ontario Municipal Board.

Because of these legal problems, the vendor informed the Applicant that closing would not take place on the date fixed, but would have to await the decision by the Ontario Municipal Board. In the meanwhile, the vendor offered to rent the home to the Applicant, which Offer was refused.

The Ontario Municipal Board judgement reversed the decision by the Committee of Adjustment and allowed the minor variance sought by the builder. Closing, therefore, took place about a year later than anticipated, when interest rates on mortgages had increased from 12¼% to 14¼%. The Applicant took possession of her home in June 1990.

Mrs. Bradburn testified that the reason for the delayed closing was because of the Ontario Municipal Board appeal being required.

The Applicant was referred to tab 13, Exhibit 4, being a letter from her lawyer dated August 17, 1989 to the lawyer of the vendor. This letter reads as follows:

We confirm our telephone conversation of today's date wherein we agreed that this matter would be extended until the minor variance is approved.

It was signed by Mark Seetner on behalf of Aitchison & Bolotenko, the lawyers for the Applicant.

Mrs. Bradburn claimed that this was the first time she saw this letter and that she had not instructed that it be written. The Tribunal notes, however, that the writer of the letter, Mr. Seetner, testified at a later point in the hearing and at that time his authority to write the letter was not questioned in any manner;

nor was its contents challenged during examination by counsel for the Applicant.

Mrs. Bradburn testified that after closing, she made a claim to the Ontario New Home Warranty Program dated April 12, 1991 (tab 29 of Exhibit 4) wherein she sought \$14,181. This claim was based on payments she had made for storage, accommodations, and meals.

The Tribunal advised Mrs. Bradburn that the maximum amount permissible under Section 19 of the Regulations was \$5,000.

In cross-examination, the Applicant began by saying that she did not go to the hearing of the Committee of Adjustment to object to the variance being granted, but just to be apprised of the outcome. She also testified that she would have been content if the variance had been granted.

The Tribunal notes that up to this point, the thrust of the Applicant's testimony was that she had been neutral and silent at the meeting of the Committee of Adjustment.

The Applicant was then referred by counsel for the Program to tab 5 of Exhibit 4, the decision of the Committee of Adjustment. The decision read as follows:

THAT the application for relief from the Zoning By-law be DENIED as it does not comply with the intent of the Zoning By-law (side yard setback requirements), as the neighbour and prospective purchaser were in objection and it is not considered minor in nature.

As appears from the judgement, the Applicant apparently took a much more decisive role at the hearing than she had indicated before this Tribunal.

Counsel for the Program then asked the Applicant what had been her role at the Ontario Municipal Board hearing. To this she responded that she had said nothing. The Applicant was then referred to Exhibit 6, the judgement of the Ontario Municipal Board, at page 4, which reads as follows:

The Board heard from Mrs. Carla Bradburn who presently holds an Agreement of Purchase and Sale as to Lot 49. Mrs. Bradburn is very concerned regarding the decrease in the side yard and cited issues of fencing and future manoeuvring of lawn

care equipment along the east side wall should the present encroachments continue.

In response to counsel for the Program's question as to how she squared this with her first statement that she had said nothing before the Ontario Municipal Board, Mrs. Bradburn stated that she did not remember speaking before the Board.

The Tribunal notes this as a second instance in which the testimony by the Applicant was contradicted by a written judgement.

Counsel then queried the Applicant about the date chosen for closing. She was asked whether she had sought any delay after the Ontario Municipal Board judgement was rendered. She stated that she had not. She was then shown Exhibit 4, tab 23, a letter from her lawyer addressed to vendor's counsel seeking a delay of 30 days for closing in order to give the Applicant time to put her financing in place.

The next witness was Brian Monroe, the Applicant's next door neighbour who had objected to the variance. He confirmed for the Tribunal that he had done so.

The next witness to testify was Mr. Mark Seetner of the firm Aitchison & Bolotenko who confirmed that he had written the letter of August 17, 1989, (Exhibit 4, tab 13), in which he agreed that the closing would be extended until the minor variance was approved.

Since it was counsel for the Applicant who presented Mr. Seetner and had the full opportunity to disavow his letter of August 17, 1989, the Tribunal accepts it as proven that the Applicant did in fact agree to an extension of the closing date until the final decision on the minor variance.

The final witness for the Applicant was Mr. James Aitchison, the counsel for the Applicant. He testified that the parties agreed to the closing date taking place after the Ontario Municipal Board judgement providing the judgement accepted the appeal of the builder.

In cross-examination, Mr. Aitchison was referred to Exhibit 4, tab 14 which is a letter from the lawyers of the builder dated August 21, 1989 and which reads as follows:

I wish to confirm my clerk's telephone conversation with you on August 17th, 1989, wherein it was agreed that the closing of the above transaction be

extended until a minor variance is granted for the above-noted lot.

All other terms and conditions to remain the same and time is to continue to be of the essence.

Yours truly
George L. Smith

In argument, counsel for the Applicant stated that by virtue of Section 19 of the Regulations, the Applicant is entitled to damages automatically simply because of the delay in the closing. He also stated that the Applicant was not responsible for the delays.

The Tribunal makes the following findings in fact before passing on the merits of this claim:

1. The Tribunal does not find the denial by the Applicant of her having opposed the variance as credible.

2. The Tribunal finds that the Applicant did, in fact, object to the minor variance before the Committee of Adjustments. She joined with her neighbour in doing so.

3. The Applicant did participate in the hearing before the Ontario Municipal Board.

4. The lawyer represented the Applicant within his mandate in agreeing to an extension of the delay for closing until after the final judgement of the Ontario Municipal Board subject to all other terms and conditions of the contract of sale remaining the same.

5. The Applicant never expressed any intention of reserving her rights to damages because of the delay in closing. Such delay was granted without any reserve and without any expressed intent to claim damages of any sort.

The first question for the Tribunal to decide is whether the Applicant in joining her neighbour to object to the minor variance before the Committee of Adjustment, thereby renounced her right to seek damages because of any delay that occurred thereafter. The Applicant must have realized or ought to have realized that in objecting to the granting of the minor variance, the whole sales transaction would be delayed accordingly. In choosing to do so, therefore, she assumed the risk and consequences of such a delay in closing. Under the circumstances, she is not legally entitled to claim damages resulting from the delay.

At the time she discovered that the property required a variance, she had the right to refuse to consummate the sale because she was not receiving the object contracted for. Instead, she chose to contest the variance and became one of the causes of the delay. In so doing, she has lost her right to seek any damages which resulted therefrom.

Even if the Tribunal found that the actions by the Applicant before the Committee of Adjustment and the Ontario Municipal Board did not deprive her of her claim, the Tribunal still holds that the Applicant is not entitled to invoke Section 19 of the Regulations. As the proof has demonstrated, both parties agreed voluntarily to the extension for the date of closing. Parties make agreements to avoid litigation and not to encourage it. It would be unreasonable to presume that either party agreed to the delay and yet did so with the intent of seeking damages resulting from any such delay. The very thrust of the Agreement was to prevent any such claims.

By the agreement to extend the delays subject to all the original terms and conditions of the contract, the parties clearly intended to substitute one closing date for another. As a consequence, neither party could be in breach of the contract as a result of those delays having taken place.

That the parties have a right to extend delays for closing as they so wish is reflected in a judgement of the Ontario Court of Justice (General Division) heard September 3, 1992 - the case of Jim Hop-On Wong and others and Reemark Sterling II Limited, Court file No. RE 1228/92.

What of the Applicant's argument that Section 19 of the Regulations applies despite any agreement to extend the delay for closing? With great respect the Tribunal believes that the Applicant is interpreting Section 19 incorrectly. As its wording indicates, the vendor is given certain restricted rights to extend delays unilaterally; but that is not the case here, where it is not the vendor who has changed the date for closing, but rather both parties together. Where both parties agree to a new date for closing, Section 19 no longer applies. It could only begin to apply again if the builder did not close on the new date fixed. In such an event, the buyer would have all his rights protected under Section 19 from the date of default.

Since in the present case the sale closed on the date fixed by the terms of the extension, the Applicant has no claim under Section 19.

Therefore, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the

Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow this claim.

MR. AND MRS. GRANT BRADLEY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

MR. AND MRS. GRANT BRADLEY, appearing on
their own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DOMENIC ROTUNDO, representing Bay Park Homes

DATES OF

HEARING: 5 October 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants from a decision set out in decision letter dated May 31, 1993 denying this claim for \$5,600 by way of compensation for delayed closing. The relevant facts are not in dispute.

On March 4, 1991, a written Agreement of Purchase and Sale was made between the Applicants, as purchasers, and Bearlon Investment Inc. carrying on business as Bay Park Homes, as builder/vendor for a new home to be built at 31 Flaxman Avenue in Bowmanville, Ontario. The contract called for a closing on September 23, 1991. On August 12, 1991, the closing was extended to January 3, 1992. On December 4, 1991, it was extended further to March 31, 1992. On March 27, 1992, the closing was extended again to April 24, 1992.

Paragraph 15 of the Agreement of Purchase and Sale (tab 1 of Exhibit 8) deals with provisions for extension and termination of the contract and reads in part:

15.

(i) The Vendor shall take all reasonable steps to construct the Dwelling without delay including satisfying any conditions precedent to the commencement of construction.

(ii) If the Vendor cannot close the transaction by the Closing Date because additional time is required for construction of the Dwelling, the Vendor shall extend the Closing Date one or more times as the Vendor may require by notice in writing to the Purchaser as early as reasonably possible before the Closing Date or extended closing date, all extensions in the aggregate not to exceed 120 days.

However, the Vendor shall not extend closing if the parties have specifically agreed in writing that the Vendor cannot, and the Purchaser does not waive this covenant.

(iii) If the Closing Date has been extended for 120 days and the Vendor still requires further time for construction of the Dwelling, unless subsequent to the Closing Date the parties otherwise agree, the Purchaser may terminate the Agreement within the 10 days immediately following the 120 day period of extension by delivering or mailing notice in writing to the Vendor at the address shown above (which notice may also be given between solicitors). Upon the giving of such notice the Agreement shall be at an end and all sums paid by the Purchaser shall be returned without interest or deduction.

However, if the Purchaser does not terminate the Agreement, Closing shall be deemed to be extended to a date 5 days following notice to the Purchaser that the Dwelling has been completed in accordance with the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period.

The first extension to January 3, 1992 was within the initial 120 day period provided and there is no provision in the Agreement that the parties have specifically agreed that the vendor cannot avail itself of this provision. The Applicant did not give the notice within 10 days following the original 120 day period of extension so the second 120 day period of extension became available to the vendor. The final extension to April 24 was within the second period of extension plus the 5 days of grace allowed in Section 17(1) of Regulation 892 made pursuant to the Act. On March 27, the same date as the vendor's solicitors wrote the purchaser's solicitors extending the date to April 24, the purchaser's solicitors wrote the vendor's solicitors (tab 9 of Exhibit 8) stating that the proposed extension to the 24th was completely unacceptable. In view of the fact that the vendor was in a position to take advantage of the two extension periods, it was not open to the purchasers to take this position. Also on April 24, a further agreement was reached between the parties evidenced by a letter of that date (Exhibit 12) from the purchaser's solicitors to the vendor's solicitors which reads as follows:

This will confirm your conversation with our office April 23rd wherein you indicated that arrangements are being made to allow purchasers to assume possession as of the scheduled closing date, being April 24, 1992. My clients have indicated that they would prefer to be able to take possession as of this date.

This will also confirm the reason for the delay is that the Vendor is not in a position to provide clear title to the property and we understand that steps are being taken to close this within the next short while.

I would appreciate it if you would confirm by return FAX that the following conditions will be applicable should my clients assume possession:

1. My clients would be responsible for payment of all utilities.
2. Adjustments would remain as of April 24th, 1992.
3. My clients shall occupy the premises from possession until the closing date on a completely rent-free basis.
4. Your client shall continue to be responsible for insurance of the premises although my clients will have insurance for their contents.
5. The deposit shall be held in escrow and to be returned in full, together with \$900.00 my clients have paid for extras and the total sum to be returned immediately should the Agreement have to be terminated.
6. My clients have advised me that they are prepared to wait no more than 90 days from the date they assume possession and in the event the transaction has not been completed with that period of time the Agreement is to be considered at an end and there shall be a mutual release and the said funds shall total \$12,100.00 which shall be returned forthwith.

The problem which gave rise to this last Agreement was the fact that there were some construction liens against the property. While the vendor was given 90 days to clear the title of these liens, in fact, it obtained the necessary Court order and was able to close the transaction on May 6, 1992 when the balance of the purchase price was paid and the deed or transfer was handed over and registered. In the meantime on April 24, 1992, the required pre-closing inspection took place and a short list of not serious deficiencies was made, all of which have been addressed

satisfactorily since that time. Also on April 24, 1992, the Applicants obtained the key and moved into the house, taking possession on that date. We have a copy of the Statement of Adjustments showing these made as of April 24, 1992 (tab 11 of Exhibit 8).

On May 5, 1993, the Applicant wrote to the Program making a claim for compensation for the late closing and sent the Program a Proof of Claim on the Program's form claiming \$5,600. These documents are found at tabs 14 and 15 of Exhibit 8. When the Applicants were not able to move into their new home, they arranged with the landlord of the premises where they had been living to stay on and they paid a monthly rent of \$700 for an additional eight months - September 1, 1991 through April 1, 1992. The total of this is the \$5,600 claimed.

The Program sets up three defences to this claim.

1. The claim was made upon the Program on a date beyond the one year allowed and is out of time and fails on this ground.

2. The extension of the closing was always pursuant to the Agreement of both parties and the claim therefore fails on this ground.

3. The Applicants have not proved damages or loss suffered by them and, therefore, cannot succeed with a claim for compensation on this ground.

The Tribunal will now deal with each of these defences.

Claim made late

Section 20 of Regulation 892 made pursuant to the Act provides:

20. A claim may be made under subsection (17)(1), subsection (18)(1) or section 19 only where,
-
- (b) the claim is made by an owner within one year after the date upon which the home is completed for possession.

It is important to note that the one year starts to run on the date the home was completed for possession (April 24, 1991) and not from the date the transaction was closed (May 6, 1991). The claim itself is provided by section 17(1):

17.(1) Every vendor of a new home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

- (a) the date originally fixed for closing the purchase agreement; or
- (b) an extension referred to in clause 3(a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

Subsection (2) goes on to provide:

(2) Subsection (1) does not apply to the period of delay in closing caused by a strike, fire, flood, act of God or civil insurrection.

The Tribunal finds that the time limited for the making of the claim began to run on April 24, 1991 and the claim was, therefore, made beyond the year thereafter and the Program has succeeded in establishing this defence. It should be added that there was evidence that the delay from March 31 to April 24 was the result of a strike by "tapers" and "drywallers" and therefore, if the Program had not been on the right side of the times limited by section 17(1), it could still have availed itself of the provisions of section 17(2).

Extensions of the closing dates were by agreement

The provisions for the liability of the Program in these circumstances are found in Section 5(iii) of Regulation 894 made pursuant to the statute and, in fact, are similar to the contractual provisions between the parties set out above. Part of this rather lengthy clause reads:

...However, if the Purchaser does not terminate as above, closing shall be deemed to be extended to a date 5 days following completion of the dwelling as required by the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period.

In this case, the parties did "otherwise agree" to the extension to April 24 as evidenced by Exhibit 12. Therefore, the Applicants cannot maintain their claim in the face of this provision.

Failure to prove damages

The evidence is clear that the Applicants did pay \$5,600 as rent to the landlord of their previous premises which they would not have paid if the transaction had closed as originally contemplated. However, it is also clear that if they had closed on September 23, 1991 they would, on that date, have been responsible for interest payments on their mortgage of \$80,000, the municipal taxes and any other rates chargeable against the property, whatever utilities and insurance they had to pay and they would also not have had whatever the value to them was the difference between the \$80,000 mortgage and the balance due on closing shown by the Statement of Adjustments to be \$101,795.75. It is obvious that \$700 a month was not much if any more than the total of these items and may well have been less. The Tribunal does not have the figures upon which to calculate any of these items, but the onus of proving the damages was upon the Applicants. Therefore even if the Applicants had been able to establish entitlement to compensation for delayed closing by meeting the test of the first two defences, the claim would have failed on this ground.

The Tribunal should refer to one other issue. In his evidence and his submissions, Mr. Bradley referred to the fact that they were late in making their claim and did not take issue with some of the action to extend the time of closing because they were not aware of their rights and of the provisions of the Act under the Regulations. He told of learning of the time limited for the claim only at the time they made it on May 5, 1993 and details of their rights only upon receipt of Exhibit 10 from the Program on June 8, 1993, being an envelope with two pamphlets setting out these matters. These facts do not assist the Applicants. (see the case of C. Ray Webb (1982) CRAT 125 at page 127:

The law is a matter of public notice, ignorance of the law is of no avail. Failure by the builder to file the Certificate of Completion and Possession in this case did not alter the fact that the claimant took possession in October 1977 and that the 1 year warranty lapsed one year thereafter and that no claim pursuant to it would be valid unless communicated to the Warranty Program in writing as provided by Reg. 4(1) as aforesaid.

Mr. Bradley also complained that they never received a Certificate of Completion and Possession from the builder. In fact, all they got was a Warranty Certificate from the Program (Exhibit 9) issued on June 3, 1993 after the one year warranty for deficiencies and the one year limited for this claim had expired. However, neither do these facts assist the appellants. This point is covered in the case of Mr. and Mrs. Josip Muncic (1985) CRAT 129 at p.130.

The nub of the problem, of course, is that the builder failed to deliver the necessary Certificate of Completion and Possession. The Appellant's argument was that, in view of this, the warranty period never began and therefore never ended. But this the Tribunal rejects. The statute is specific as to when the warranty begins - it begins on the date of the delivery of possession or, if you like, on the date of completion and possession. (The word "completion" apparently referring to the completion of construction rather than completion of the conveyance.) However, the certificate, which the builder or vendor is under a mandatory obligation to deliver, is merely the best evidence of the date in question, but where lacking is not the only possible evidence of that fact which is a fact of historical record.

The warranty protection conferred by the Act is conferred by the Legislature and was not found at common law. The rights thus given are limited qualitatively, quantitatively and temporally. In the latter regard they are limited to the first year (or in certain cases to the first five years) - not the first year following the event which the certificate is meant to certify or evince. Failure by the vendor to deliver the certificate does not alter this.

Therefore, by reason of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

MR. AND MRS. JOSEPH BROEDERS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
HANS G. KEPPLER, Member

APPEARANCES:

MR. AND MRS. J. BROEDERS,
appearing on their own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DEREK R. FREEMAN, representing Gosse Construction
(added as a Party at the hearing)

DATES OF

HEARING: 28 June 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal brought by Mr. and Mrs. Joseph Broeders under Section 14(1)(b) for damages against the Ontario New Home Warranty Program arising from a contract between themselves and the builder R. Gosse Construction. The Applicants, unrepresented, have been involved in a considerable amount of litigation with the builder and the result of the litigation in the Supreme Court has been a settlement in which both parties R. Gosse Construction and the Applicants signed Mutual Releases; the latter Release signed by Mr. and Mrs. Broeders is dated August 14, 1991. As a result of the litigation and the Mutual Release, all issues were settled between the parties at that time and I refer to all issues as those involved in any claim against both the builder and the Ontario New Home Warranty Program which at that time existed. The Releases, therefore, cover all claims of the appellants.

There appears to be no issue as far as the Release signed by Mr. and Mrs. Broeders is concerned. They signed it upon the advice of their solicitor and they acknowledge the execution of the Release. The Courts in many cases involving Releases which have been contested later on by parties have taken a very strict view of the obligations placed on those parties in the execution of a Release. Where it has been recognized that a Release was the settling document of all issues, the Courts have taken the view that that Release ends all matters because there must be an end to

litigation and the Release provides that end. For parties to expect further litigation after signing a Release, it has been held by the Courts in many occasions that they had no claim and all issues are settled. That is the view which this Tribunal must take today and as a result, we hereby disallow the claims of the appellants.

The above decision and reasons therefor were orally given by the Chairman at the conclusion of the hearing by the Vice-Chairman in the presence of the other members who concurred.

NORMAN AND CHERYL BROOK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
SELWYN CHARLES, Member
LOUIS A. RICE, Member

APPEARANCES:

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

No one appearing for the Applicants

DATE OF

HEARING: 18 June 1993

Toronto

REASONS FOR DECISION AND ORDER

No one appearing for the Applicants by 10:00 o'clock in the forenoon, upon the application of counsel on behalf of the Respondent, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicants.

The above decision and reasons therefor were orally given by the Vice-Chairman at the conclusion of the hearing in the presence of the other members who concurred.

RAY CAMENZULI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
SELWYN CHARLES, Member
EDWARD WEISZ, Member

APPEARANCES:

RAY CAMENZULI, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 9 November 1992

Toronto

REASONS FOR DECISION AND ORDER

Ray Camenzuli took possession of his new home in Orangeville from the builder Dalerose Hockley Limited on the 20th of August 1990. Less than two months later, he had directed a list of sixteen complaints to the Ontario New Home Warranty Program as a result of which a conciliation was held at the premises on January 9, 1991 with the owners in attendance, together with the builder and Mr. J. Fortune, representing the Program.

The builder attempted to address the complaints for which he felt responsible and after a number of reinspections by the Program, it appears all issues were addressed with the exception of four which are before us today. Two are taken from the conciliation report of January 9, 1991:

1. Master Bedroom - Window frame in the ensuite is gouged.
2. All doors upstairs are hung too high.

The remaining two complaints involve claims for a credit for the furnace and for a watertank the Applicant contends should have been supplied as part of the contract price.

Dealing with the latter claim for a hotwater tank, we note the contract between the parties (Exhibit 4) provides:

Vendor to install high efficiency gas water tank.

and on Schedule (A):

Gas-fired, hot watertank on rental.

We have no hesitation in concluding the parties understood and agreed that the hot watertank, although to be installed by the builder, was to be rented. We, therefore, disallow the claim.

Mr. Camenzuli claims a credit for the furnace, but he has received a credit in the sum of \$155 and no price is stipulated in the contract concerning the furnace. On the evidence, we must therefore disallow this claim.

The main issue in this appeal is the complaint that all the doors in the upstairs are hung too high. To assist us in this determination, Mr. Camenzuli has provided us with a list of his measurements (Exhibit 4) as follows:

MEASUREMENTS OF DOORS OF LOT 37
CARDINAL WOODS PHASE II

The upper floor of this house has 13 doors. These doors were measured November 8th. 1992. The measurement was taken with a machinist ruler graduated in 1/16ths. of an inch. Some readings had to be rounded off the nearest 1/16 th.

- | | |
|------------------------------|---------------|
| 1) Door to toilet in ensuite | 13/16" |
| 2) Door to ensuite | 13/16" |
| 3) Master bedroom closet | 16/16" |
| 4) Master bedroom doors (2) | 13/16" |
| 5) Master bathroom | 17/16" |
| 6) 2nd. bedroom | 13/16" |
| 7) 2nd. bedroom closet | 14/16" |
| 8) 3rd. bedroom door | 13/16" |
| 9) 3rd. bedroom closet | 13/16" |
| 10) 4th. bedroom | 14/16" |
| 11) 4th. bedroom closet (2) | 7/16 - 11/16" |

Please note that 5 = 10/16"

It is to be noted that only the door to the closet in the master bedroom exceeds 1". The evidence of Mr. Fortune on behalf of the Program is that there is no standard of measurement, but that a gap of 1" is not only acceptable but good for air circulation and heating. His report of February 11, 1991 directed to the appellant deals with the issue as follows:

I measured each of the entry doors, including the closet in the hallway, to determine the height of the bottom of the door above the finished flooring. With the exception of the bathroom door, which had a 1" gap, the height of the doors above the floor was between 7/8" and 3/4". Your builder has adopted the position that the height of the doors above the flooring is acceptable, while you claim that the hanging of the doors was not as per the verbal agreement you had with the builder, and that at any rate, up to 1" of a gap below the door is unacceptable.

I have spoken with staff of this office, as well as a number of different building departments to determine if any infringement of a Code pertaining to heating has been infringed. In most cases, it was suggested that up to 1" of a gap below the bottom of a door and the finished floor would allow for the proper circulation of air from room to room within your home. Based on these opinions, the Warranty Program now finds the installation of the doors on the second floor of your home to be acceptable.

The argument that the builder breached his agreement with you cannot be considered by the Warranty Program, as it would appear that the only agreement made was verbal. As both you and the builder have opposing views as to what this agreement actually stated, I could only address the problem of the doors in respect to poor workmanship. It would appear that the builder has not infringed any Heating Code by installing the doors in the manner in which they did. In addition, it would

even appear that the builder was within the guidelines recommended for proper air circulation within a home.

We note also that the evidence discloses the doors were hung by the builder prior to the final floors being laid. The installation of the floors was entirely the responsibility of the owner not the builder. The report of Douglas Irvine, Senior Conciliator of the Program on April 16, 1991 concludes:

2. The doors in the upper level of the home were all noted to have gaps between the finished flooring (completed by the owner) and the base of the doors. Previous measurements revealed the gaps ranged from 3/4" to 1-1/8" and these gaps are recommended by the heating inspector for air flow. There is evidence that the flooring installed by the owner was shown to the carpenter prior to the door installation, however, due to discrepancies in what was verbally stated between the owner and the carpenter, the Program must deny any warranty on the size of the gaps below the doors.

Mr. Fortune on July 18, 1991 points out in his correspondence to Mr. Camenzuli that there have been no infractions of the Building Code:

Regarding your enquiry into the code requirements for the construction of your home I direct you to the Dufferin County Building Department. The building inspectors have inspected your home and have found it to meet the requirements of the Ontario Building Code. If you have specific questions regarding the Building Code I ask that you direct those questions to the people responsible for enforcing the Ontario Building Code.

On this issue, the Tribunal cannot find either a breach of the Ontario Building Code or a defect in workmanship or materials required under Section 13(1) of the Ontario New Home Warranties Plan Act and must, therefore, disallow the claim.

In presenting his claim with regard to the frame in the ensuite bathroom window, Mr. Camenzuli tendered in evidence a photograph (Exhibit 6) of the damaged area. Mr. Fortune who has

inspected the home three times concludes the builder's repair to the frame which was accidentally gouged was quite acceptable. The appellant's claim is based on the aesthetic appearance of the frame which is repaired otherwise in a satisfactory manner. We are, however, not persuaded that a pronounced aesthetic defect does not fall within the scope of Section 13(1) and, therefore, allow this claim. Since however the builder has not been able address this issue to the satisfaction of the owner, we are of the view that the matter should be settled by the payment to the appellant of \$300 thereby enabling him to effect the repairs to his own satisfaction.

The Ontario New Home Warranty Program is hereby directed to pay to the appellant the sum of \$300 in full satisfaction of this claim and all others are hereby disallowed.

ROBERT CAVALLO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:
ROBERT CAVALLO, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 12 May 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a decision letter to the Applicant on January 18, 1993 which is the second last document found at tab 30 of Exhibit 5. The Applicant purchased a new home to be built by the vendor/builder, Woodheath Developments Ltd. at a location which came to have the municipal address of 73 Wickens Crescent in Ajax, Ontario. The date shown on Schedule "A" attached to the Agreement of Purchase and Sale is April 6, 1991. We do not have the page from the Agreement which gives the date of the signing of the Agreement itself or the day fixed for closing of the transaction, but we do have a Certificate of Completion and Possession which gives the date of possession as being June 21, 1991.

The Applicant is seeking at this hearing redress from the Program with regard to five items of complaint or deficiency in his home.

1. A water leak into the garage at the roof flashing.
2. A water leak into his cold cellar in the basement.
3. Water leaking at a window in the staircase.
4. Roof sheathing not installed close enough to the fascia.

5. Mortar cracks in the chimney cap allowing water to enter and come down and cause damage in the interior of the building in the area of the chimney.

In determining what order the Tribunal should make regarding these complaints, each must be considered separately.

Water leak into the garage at the roof flashing

In his evidence, the Applicant said that, off and on from the beginning, they had a leak there from either rain or snow melting. He said there was a gap between the fascia and the roof where water came in. Sometimes it leaked when it rained and sometimes it didn't. He further said that this had been repaired three times, the last being in January 1993. This defect was reported to the Program within the first year stipulated, but the Tribunal finds that the Applicant can make no recovery on this item because the evidence indicates that when the last repairs were completed, they appear to have remedied the defect as it has not leaked since. The Applicant did say that he suspects there may still be a problem, but he has nothing upon which to base this. The Applicant filed a photograph, Exhibit 7, which showed evidence of where the water had come in from the leak, but the Tribunal must find on the evidence that this defect has been remedied and does not require any further action on the part of the Program.

Water leak into the cold cellar in the basement

It was the evidence of the Applicant that water had come in through the wall of the cold cellar and came out under a raised hardwood floor in the area of the basement outside the cold door and caused the boards in this floor to expand and become "cupped" or wavy. With regard to this complaint, the Applicant admitted that he had not seen any water coming in this way since the repairs in January. The evidence adduced on behalf of the Program established that there was no report of this claim to the Program within the time limited by the Ontario New Home Warranties Plan Act. I have already referred to the Certificate of Completion and Possession. There is a list of complaints attached to it and none of the complaints with which we are concerned here was included in this list except for item 43 "garage ceiling leaks" which does refer to the first one with which I have dealt above.

On January 10, 1992, as a result of his complaints to the Program, the builder prepared and had the Applicant sign an acknowledgement that representatives of the builder had attended and done remedial work and that everything was now in order except for six listed items (one blacked out) and a number of notes as to further complaints or defects by the homeowner. This item of water in the cold cellar and damage to the hardwood floor outside it and

none of the next three items mentioned are included in this document. Another such acknowledgment is set out in a similar document dated January 30, 1992 in which the list of 6 is down to 3 and the list of noted complaints is also reduced. There is still no reference to any of these four items now in contention.

There was considerably more correspondence between the parties dealing with other defects and claims and on July 23, 1992, the Manager of the Program's Regional Office in Whitby wrote to the Applicant stating:

In order that we may expediently address the issues of concern to you and bring this situation to a final resolve we ask that you please complete a final and comprehensive list of all your outstanding concerns. Immediately upon receipt of this list we will review the list and respond as to each item's warrantability.

In response the Applicant sent in a handwritten list with 18 items (the last document at tab 27 of Exhibit 5). None of these four items are on that list.

Mr. Tony Allegranza, a representative of the Program gave evidence that he inspected the house twice on November 2 and on December 16, 1992. On November 2, it was raining and that was why he went on that day. In the cold cellar, he saw some water on the wall on the side opposite the door but no water on the floor and no sign of damage to the hardwood floor outside the door. Neither did Mrs. Cavallo, who was there, point out or make any mention of damage to this floor.

As a result of the observations then made, the Program had remedial work done to stop the water seen leaking into the cold cellar and, as stated above, the evidence is that there has been no more water seen since the January 1993 repairs. Mr. Allegranza could see nothing to connect any damage to the hardwood flooring in question with the water he saw on the cold cellar wall and, as aforementioned, he did not see or have brought to his attention any damage at all to this floor. The Applicant filed a photograph of part of this floor, Exhibit 6, but one cannot tell from it if there is such damage. Altogether on the evidence, the Tribunal can not find any warrantable defect under this heading for which the Program should be responsible. The proper finding with regard to the leak itself is that it is now repaired. As far as the floor is concerned, there is no report or claim made within one year, not sufficient evidence to establish that damage was caused by water leaking through the basement walls and indeed, not sufficient evidence of any defect requiring remedy.

Water leaking at window in the staircase

We are concerned here with a large bay window which extends up two stories at the front of the house as seen in a photograph Exhibit 11. Apparently, there is a staircase inside it which accounts for the leak being said to be in a window in the staircase. There is a rather strange issue regarding this window - whether or not it was replaced after the house was built. It was the evidence of the Applicant that there were a number of problems with the window and finally the builder took the step of replacing the whole of this large window with a new one. On behalf of the Program, there was called as a witness Corey Libfeld, the Customer Service Manager of the builder, who stated categorically that his company did not replace this window. He reviewed the company's records of work done and repairs made in other areas of the house including the work done in November 1992 and January 1993 to which reference has been made above and other work as well and said that there is no record whatever of anything with regard to this window. He said that he had a file 1" thick with regard to complaints in remedial work done at this location. Mr. Cavallo was equally emphatic that someone did come and replace the whole window.

However, the issue which the Tribunal must determine is whether there remains now a warrantable defect with regard to this window. While there were quite a number of written lists of complaints submitted to the Program at different times, none of them ever contained a reference to this item and, therefore, it cannot be allowed on this ground. While the time for making claims with regard to this window might have been extended as a result of its being replaced by the builder, we have no evidence whatever as to when this was done, if it was done and no finding to assist the Applicant can therefore be made on this basis.

Roof sheathing not installed close enough to the fascia

Exhibit 8A is a photograph of a long view of the roof showing the area of the complaint and Exhibit 8B is a photograph showing the gap of which the Applicant is complaining. The Applicant gave evidence that water comes in here when there is rain driven in that direction. Again the complaint is not on any of the lists to which reference is made above. The first complaint in writing of this defect is found in the handwritten letter to the Program from the Applicant dated December 3, 1992, a copy of which is the first document at tab 30 of Exhibit 5 in which three complaints are listed, the first one being (1) Roof sheathing not close enough to fascia - there is an access point where water comes in. This is clearly outside the time limited and the claim must fail on this ground.

Mortar cracked in the chimney cap allowing water to enter and come down and cause damage in the interior of the building in the area of the chimney

Photographs being Exhibits 9A and 9B filed by the Applicant show where he describes this water getting in. A photograph, Exhibit 10, shows a part of a wall beside the brick chimney in the family room on the main floor which the Applicant said is discoloured and disfigured by this water. Unfortunately, the colouring is off in the photograph and one cannot see evidence of this complaint in it. Exhibit 13 is a photograph taken by an official of the Program showing more of the same wall and chimney and part of the fireplace. It is not off colour and there is no sign of any discolouration or damage to the wall in it. Again the first notice in writing of this complaint to the Program was in the December 3, 1992 handwritten letter to the Program clearly outside the one year limited by Section 13(4) of the Act. Therefore this claim fails by reason of not having been made properly on time and, in any event, not being proved by the Applicant.

Therefore pursuant to the provisions of section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicant.

CHANTAL DEV. (ONTARIO) LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
ALBERT LONGO, Member

APPEARANCES:
JOHN GELETA, President, Chantal Dev. (Ontario) Ltd.

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 2 September 1992 Toronto

REASONS FOR DECISION AND ORDER

Chantal Dev. (Ontario) Ltd., a company operating as a builder, applied for renewal of its registration on March 23, 1991. The Registrar replied on December 6, 1991 that no further consideration would be given to the application until the company reimbursed the Program in the sum of \$5,216.09 representing payment made by the Program to one Woodworth for repairs the builder had failed to complete.

It appears that as a result of several complaints by the owner about the repairs necessary to complete the home and the failure of the builder to do so, the Program after a conciliation meeting on August 31, 1990 served notice on the builder that the work was to be completed within 30 days of its receipt of the notice. The conciliation report addressed some 14 items under Schedule "A(1)" deemed to be warranted. It is to be noted in tab 12 of Exhibit 8 that the document dated September 17, 1990 was sent by double registered mail and contained the following:

Chantal Dev. Ltd.
1112 March Road
Kanata, Ontario
K2K 1X7

Re: Woodworth - 33 Chateau Crescent, Embrun

Dear Sir:

Enclosed is a copy of the conciliation report on the above property. Please be advised that THIS IS YOUR ONLY NOTICE to substantially complete the work as listed on Schedule "A(1)" within thirty (30) days of receipt of this letter. You are to contact the purchaser and make arrangements to commence the work within fourteen (14) days unless the purchaser requests a delay. Your purchaser has been advised to contact us should you fail to respond to this notice within the specified time.

If there is a legitimate reason why any item cannot be completed within the time specified above or you object to the warrantable determination of the item, you MUST notify the Warranty Program in writing prior to expiry of the notice period with an explanation as to the reason.

Should you fail to proceed with and complete the work as detailed in Schedule "A(1)" in the above time frame, you will be considered to be in breach in your warranty, and the Warranty Program will resolve the outstanding warranted items either by cash settlement or by undertaking the work. You will be invoiced for our full cost including an administrative fee.

Please note this is a chargeable conciliation.

Yours truly,

Debbie Pickup
Conciliation Coordinator

The work was not completed by the builder and the Program received two estimates, one from Lake Street Building Corporation and the other from Total Supply Services in the sum of \$4,239 and \$7,100 respectively.

The homeowner (Woodworth) was offered a cash settlement in the amount of the lower bid and the matter was concluded by a Release signed by Woodworth on March 18, 1991. The builder then received an invoice dated April 19, 1991 for \$5,216.09 which remains outstanding.

The facts involving the homes of one Williams, 37 Chateau Crescent, Embrun are similar to those of Woodworth. After receiving a request for conciliation by the owner, an inspection of the property was made on December 13, 1990. Seven complaints found to be warrantable were addressed. Again a notice was sent to Chantal Dev. to complete the work within 30 days of January 8, 1991 or the Program would proceed to exercise its options under the Act. The work was not done by the builder and as a result, the Program after receiving an estimate from Andre Philion proceeded to settle the issues with the owner Williams by a cash payment of \$2,430. Williams executed a Release on November 18, 1991. The builder subsequently received an invoice for \$2,990.12 which included an administration charge of \$364.50 and GST of \$195.62. This amount remains unpaid.

In his request for an appeal, the builder advances two reasons. They are:

1. Woodworth residence - 33 Chateau Crescent, Embrun.

There were some minor repairs to be done on residence, but at one point we did not have access to the house. Later, we found that owner started negotiation with Ontario New Home Warranty Program about cash settlement behind our back. We had no time to complete repairs or be involved in any way only to pay cash settlement which we consider outrageous and not warranted.

2. Williams residence - 37 Chateau Crescent, Embrun

We tried to repair some works. We met owner several times and made appointments to come and do repairs but a few times they were not there or they refused entry to our subtrades. At one point, Mr. Paul Rochon promised to stay in the house all the time when works would be performed.

Also he warned the owners he would close their file if they did not co-operate and let our subtrades in to perform repairs. We were surprised by the ultimatum by Ontario New Home Warranty Program (letter dated Sept.23, 1991) which we did not accept.

In both cases we have plenty of documentation, that we were willing to do repairs and that Ontario New Home Warranty Program acted incorrectly when they agreed to pay owners claims on their own.

Yours truly,
John Geleta, President

The evidence before us does not permit us to agree with the appellant concerning either of the properties. The notices the company received are clear and unequivocal. The work was not done and complaints to the Program could have gone on interminably. In the Williams case, the complaints began in September 1990. The work was finally done and a Release signed in November 1991. In the matter of Woodworth, the Program received the first complaints from the owner in January 1990. The work was eventually completed and a Release signed in March 1991.

It is clear that while the builder has only his own houses to look after and service, the Warranty Program may have several thousand. It cannot afford to continue long and protracted negotiations and conciliations with each owner and builder covered by the Act. We consider the notice in each case, therefore, to be sufficient for the builder to act according to its obligations both to the owners and the Program.

While it is not within the province of this Tribunal to order payment by the builder to the Program, we find that in the Williams claim there is the sum of \$2,990.12 owing by the appellant to the Program and in the matter of Woodworth, the sum of \$5,216.09. It is a condition of registration that the builder reimburse the Corporation for any sums paid by the Corporation to complete the work contemplated by the builder's contract. The appellant will, therefore, comply with the terms of its registration within fifteen days of the release of this decision, but in the event it has not, the Program is directed to carry out its Proposal.

(see 25 C.R.A.T. 743
745)

ROMEO CHOSA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding

APPEARANCES:
JOHN WEINGUST, Q.C., representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 15 January 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program, rendered June 23, 1992 to disallow the six claims of Mr. Chosa for return of deposits made against the purchase of six lots.

The Applicant's claim was made pursuant to Section 14(1)(a) of the Ontario New Home Warranties Plan Act and alleges that he is a person who entered into a contract with a vendor for the provision of a home and paid such vendor \$20,000 by way of a deposit for each of the six homes and that the vendor failed to perform the contract, thereby entitling him to recover the sum of \$120,000.

In an earlier decision dated March 1, 1990, the Program had accepted the claim partially but in the following decision of June 23, 1992 rejected it in its entirety. The judgment of the Program rendered by Steve Wheaton was that Mr. Chosa had not conclusively demonstrated that he would have become an owner as defined in the Act because he had not proved that monies were paid to a "vendor" as defined in the Act, that the transaction would have resulted in a transfer of a home, and that the vendor entity had breached the Agreement of Purchase and Sale. The Program held that he had failed to do so for the following reasons, which are of a very technical nature:

1. That payments were not made to the entity alleged to be the vendor;

2. The alleged deposits were not made in accordance with the terms of the Agreement;

3. That the "Agreements" suggest that the units were not being purchased by Mr. Chosa and his associates for the purpose of "occupancy";

4. That the Amendments to Agreement submitted for four of the lots which amended the purchaser's name were highly irregular in that they were executed well after the apparent termination of the Agreements;

5. The role of Mr. Karl Klatt raised some concerns.

Judgment in this case was rendered orally and the following is the written judgment.

The first witness to testify was Mr. Romeo Chosa, the Applicant. His testimony was that in 1987, he had visited a subdivision on which homes were to be built. He was pleased by its general location and the homes that were to be erected on various lots.

Mr. Chosa is Filipino and he felt that it was desirable for himself and a group of family and friends to get together to form their own small community within that subdivision. It was on that basis that he was selected by the group to enter into negotiations for the purchase of six lots, each of which was to be occupied by a single owner.

Mr. Chosa would, therefore, occupy one of the six lots once the home thereon was constructed and five other families would in their turn each select a lot and home which they would occupy.

To this end, they gave him a Power of Attorney orally to represent their interests in negotiating the purchase from the vendor and to make deposits as needed up to an amount of \$20,000 per lot for a total of \$120,000.

Mr. Chosa testified that pursuant to this, he in fact entered into six Agreements of purchase with the builder, one Pugliese, who was operating the vendor corporation with the corporate name 582270 Ontario Inc. Prior to signing these Agreements, he had visited the lot sites and had also visited the office of Pugliese to formally choose the lots and see the various floor plans and models available. It was on the basis of the model chosen that the final purchase price on each of the lots was reached. All the documents including the Purchase Agreements and the site plan are contained in Exhibit 5.

During the course of negotiations, Pugliese instructed Mr. Chosa to deal with one Karl Klatt who was described as a representative of the vendor for the purpose of these sales. Mr. Chosa also met John Pugliese, the builder, at his office.

As a result of the negotiations and his mandate, Mr. Chosa signed each of six Agreements for the purchase of Lots 1, 2, 3, 21, 24 and 30 of the subdivision at the various prices indicated in these Agreements. These Agreements were all signed in the Spring of 1987.

Mr. Chosa testified that because he was the most financially secure of the six families, he undertook to assume the deposits amounting to \$120,000 would be made to the builder as required under the various contracts of purchase subject to the understanding that the parties would pay the amounts they could in the interim and would make up for their deficiencies at the closing of the contracts.

Evidence was then made by way of deposit of the cheques of payment of deposits to the vendor for his designated payee, showing that after the signing of the various deeds, deposits were made by the various families amounting to \$120,000.00

It is to be noted that on one of the lots, Lot 3, the deposit added up to \$25,000 - \$5,000 in excess of the amount permissible under the Act. As a result, the deposits that would be covered under the Act amount to \$115,000 rather than \$120,000.

While the other families made payments that were applied against more than one lot, this was in order to equalize the amount of the interim deposit of \$10,000 each was to pay and not because any one of them intended to purchase more than one home.

The deposits were paid generally with the schedule set out in the various Purchase Agreements; because Mr. Chosa's cashflow or that of the others was not always sufficient, the purchaser, at times, was asked, and agreed to, accept payment after the date set out in the Agreement. It should be emphasized, however, that the purchaser received the full amount of the deposits promised.

Although the builder had undertaken to begin construction immediately, Mr. Chosa noticed that construction did not begin. The builder attributed this to the fact that there had been a lot of rainfall which affected the soil and, therefore, held up construction. Unfortunately, this turned out to be a false excuse since on January 19, 1989, Mr. Chosa received a letter from the builder advising that his company would not proceed with construction and sale of the various homes; the letter also promised to refund the deposits paid (Exhibit 15).

The promised refund was never made and as a result, Mr. Chosa, on behalf of himself and the families he represented, made six separate claims for reimbursement of the deposits from the New Home Warranty Program.

Mr. Chosa testified that when he had explained all the details to the Program, they felt that the documentation did not make clear enough the fact that he had acted as an agent on behalf of the other five families.

Mr. Chosa, therefore, filed a Power of Attorney signed by each of the other families, empowering him to represent them in claiming reimbursement of their deposits (Tab 5 of Exhibit 5). In tab 6, an Amendment to Agreement was filed with the Program setting out the name of the family which was to receive each of the other five lots. The Tribunal notes that these two documents were filed without subterfuge or sham, and simply to indicate to the Program what the nature of the relationships were between the various parties. Thus the date on which each of these Agreements was signed was posterior to all of the events, including the claim, so that the Program was fully aware that it was a supplement to the various documents filed.

Mr. Chosa even had Mr. Pugliese sign the Amendment to Agreement to demonstrate to the Program that he was aware that other families were to be the purchasers of the other five lots. The Tribunal also notes that in his testimony, Mr. Chosa said that one of the other purchasers accompanied him when visiting Mr. Pugliese and that the latter was informed in advance that Mr. Chosa was buying on behalf of six different families, including himself.

On March 1, 1990, the Program issued its first judgment, signed by Mr. Steve Wheaton, in which it accepted the claim of Mr. Chosa only for the deposits he himself had paid to the builder and not for the deposits made by the others since only Mr. Chosa had been named the purchaser in the six Agreements.

Mr. Chosa appealed this decision since he felt he was entitled to the full amount of the deposits, including those paid by other families.

The hearing before this Tribunal was set for July 26, 1991, but Mr. Chosa did not appear on this date. He testified that he had requested a postponement which the Program refused.

On the date of the hearing, as appears from the judgment of this Tribunal, the Program applied for dismissal of Mr. Chosa's claims, but this was refused. The Tribunal did so because in the decision of the Program it had specifically accepted Mr. Chosa's claims under section 14(1)(a) of the Act subject to his proving the

amounts of the payment. The Tribunal, therefore, went on to direct the Program "to issue a further decision letter outlining the nature of its disallowance in accordance with the provisions of section 16(1) of the Act from which decision the Applicant will have the right to appeal to this Tribunal under the provisions of section 16(2)."

As stated at the beginning of this judgment, the Program issued a second judgment in which it simply disallowed the entire claim.

Mr. Chosa stated that it was because his lawyer was not to appear on the date fixed, that he failed to appear himself. He went on to testify that his intention at all times was to have six families including himself live in the homes to be purchased and that the purchase was not entered into with the intent to resell by himself or any of the other families.

In cross-examination, Mr. Chosa testified that he was loaning the other five families money as required to make their deposits, but these arrangements were not made in writing. He expected each of the families to repay the loans at the time of closing.

When asked about his meetings with Mr. Klatt, he testified that they took place at the offices of Mr. Pugliese.

When asked why the cheques issued did not specify the numbered company as the payee, but rather Pugliese or Pugliese Homes, Mr. Chosa answered that this was at the direction of Mr. Pugliese himself, representing the vendor corporation.

When questioned about this point by the Tribunal, the Program stated that it had no information which would in any way negate what Mr. Chosa had said as to the direction of payment by Mr. Pugliese. Mr. Chosa had, therefore, paid the vendor or the vendor's choice of payee.

The next witness to testify was Mrs. Gavina Valenzona, the sister of Mr. Chosa.

She stated that she was asked by her brother to come with him to Mr. Pugliese's office to see the plans for the homes that could be built on the lots and to negotiate the prospective purchase of the lots and homes to be built. After visiting the offices, they were visited in turn by Mr. Klatt who was sent by Mr. Pugliese.

She and her brother then talked to their friends and received the mandate to proceed with the purchase of the six lots

and the homes to be built on them. She stated that at the time the agreements were drafted for the purchase of the lots and homes thereon, the various families had not yet decided amongst themselves who would get which lot. This was to be decided later on when the closings were to take place and based on the amount that each could afford to pay. Ms. Valenzona testified that she and the other four agreed to put up \$10,000 of each deposit amounting to \$50,000 in all and that Mr. Chosa would cover the rest. At closing, they would adjust among themselves to take into account the repayment of the deposits made by Mr. Chosa on their behalf.

Upon conclusion of her testimony, both parties agreed that were Mr. Par, Villa and Madriaga to testify, they would all corroborate the testimony given by Ms. Valenzona.

Mr. Steve Wheaton testified on behalf of the Program. He stated that his first judgment did indeed award almost \$75,000 to Mr. Chosa based on the amount of cheques which he himself wrote, but that he had changed his mind before the first hearing because of what he considered to be irregularities in the transaction with the builder. He was not satisfied by the attorney's for Chosa's answer with respect to these irregularities leading to his decision to deny Mr. Chosa's claims entirely.

The Tribunal notes that the reasons given in that judgment, and set out at the beginning of this judgment, are extremely technical in nature and seem to be based on the informality with which the various purchasers acted among themselves. Specifically, he found it unacceptable that deposits were made by different purchasers for different amounts against various lots; that each of the purchasers names did not appear on their respective Purchase Agreements; and that the numbered company did not receive the payments, but rather Mr. Pugliese or Pugliese Building. He did not deny that the builder did in fact receive deposits of \$120,000 against the purchase of six lots; rather, he found that the informality with which it was done gave the Program the right to deny the claims.

In cross-examination, Mr. Wheaton was presented with his judgments on certain claims of Mr. and Mrs. Crawford. The Crawfords had also dealt with the same builder, Mr. Pugliese, for the purchase of two lots with homes to be built thereon. They too had made deposits which at the direction of Mr. Pugliese were not made to the numbered vendor corporation but rather to Pugliese Building even though the contract was made with the numbered corporation. In addition, the Crawfords were purchasing two lots which could give rise to the same fear that perhaps they were being purchased for speculative reasons. Despite this, Mr. Wheaton granted the Crawford's claim in full and refunded their deposits of

\$40,000. Pugliese had failed to proceed with the construction of the homes and to refund the deposits.

When asked by the counsel for Mr. Chosa, why he was prepared to grant the Crawford claim when they had made payment to someone other than the person named in the agreement, while rejecting Chosa's claim, Mr. Wheaton had no satisfactory answer. In similar manner, even though the Crawfords had purchased more than one lot between themselves, he did not reject their claim whereas in the case of Mr. Chosa, he did. Thus, he issued two contradictory judgments in a matter involving almost identical facts.

Mr. Wheaton was also asked about a claim which he rejected, involving one Lieselotte Lenhart. In that case it had been shown that one Mr. Klatt had acted on behalf of Lenhart, the purchaser, and not the builder and had received direct payments from Lenhart. This was the exact opposite of what happened with Mr. Chosa where it was Mr. Pugliese who sent Mr. Klatt to see Mr. Chosa and where none of the payments were made to Mr. Klatt. Despite this, Mr. Wheaton, based on an unsubstantiated suspicion, chose to reject the claims of Chosa, even though absolutely no payments had been made by him to Klatt.

This concluded the case by the Program.

The Tribunal finds that the testimony of Mr. Chosa and Ms. Valenzona was credible. The documentation and cheques produced in support thereof fully corroborate their allegations.

When one strips away all the informalities and diverse cheques in payment of deposits, certain facts remain clear:

While not done in writing, Mr. Chosa was selected by five other families to act as their agent and attorney for purposes of purchasing six lots, one for Mr. Chosa and one for each of the other five families.

It was on that basis and subject to those agreements, that Mr. Chosa himself signed each of the six contracts and eventually made each of the six claims against the Program for reimbursement of the \$20,000 deposit per lot, for a total of \$120,000.

The Tribunal finds that all of the evidence leads to the conclusion that Mr. Chosa was acting for himself and for the five others and not for himself alone; no evidence was led to suggest the contrary.

Section 14(1)(a) of the Act is clear in its specification of who may make a claim for reimbursement of a deposit; it states:

14-(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....
the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The Regulations fix the limits at \$20,000 per sales contract. In the present case, it is incontrovertible that Mr. Chosa is such a person, in his own capacity and as an agent of the five other families. He was dealing with a vendor who failed to perform its contract, the whole for the provision of a home for himself and each of the five people he represented.

One of the major purposes of the New Home Warranties Plan Act is to compensate a buyer for the loss of a deposit through no fault of his own. It is certainly not the purpose of the Act to set up technical hurdles which are not only impossible to satisfy but can be interpreted at the whim of whoever applies them.

That the payee of a deposit may be a person designated by the vendor other than himself may not be the cause for refusing a claim. The unfairness in setting such a requirement was clearly brought out in the present case where Mr. Wheaton allowed the claim of the Crawfords while refusing that of Mr. Chosa even though both had done the exact same thing with respect to the payees named on the cheque of deposit. Thus a different standard was applied to the Crawfords and Mr. Chosa. This constitutes a clear injustice to Mr. Chosa. Rules must be applied the same way to each party if justice is being fairly carried out. If Mr. Chosa acted in the same way as the Crawfords in issuing the cheques, this should not have been used as a reason for denying his claim.

In similar fashion, even though Klatt was proved to be the agent of the vendor and not of Mr. Chosa, as contrasted with the case of Lenart, Mr. Wheaton still chose to disallow the claim. This is unacceptable.

Mr. Wheaton complained in his judgment of amendments to the Agreement which set out the specific purchasers' name, and amendments which were executed well after the sales. These Amendments, however, were filed in order to respond to certain concerns of the New Home Warranty Program and solely to clarify what the Agreements between the parties had been. The fact that Mr. Pugliese signed them lends further credibility to what the intentions of the parties were in the Chosa group. Mr. Chosa at no time indicated that these Amendments to Agreements were anything other than amendments and did not predate them. They were signed in an open manner and for a clear purpose. The purpose was in no way illegal or illegitimate. In this regard, it is to be noted that all the written documentation filed in the record was executed well before the claims were made to the Program and prove the contents of the Amendments to Agreement.

Mr. Chosa was entitled to sign contracts and make claims on behalf of the other persons. The six families did in fact suffer the loss of their deposit because the builder failed to proceed with the construction of the home and to honour his promise to return the deposit. These six claims clearly fall within the scope of the Ontario New Home Warranty Plan protection Act and should be paid up to the limits fixed by the Regulations. In the present case, this amounts to \$115,000 since one of the lots received a total deposit of \$25,000, \$5,000 more than the Act would cover.

The parties have asked that this Tribunal direct the New Home Warranty Program to whom the Program should make payment and in what amount. This is under reserve of the rights and recourses of both parties.

Accordingly by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to make payment as follows:

Romeo A. Chosa the sum of	\$68,334.00
Emerterio and Cecilia Chosa the sum of	\$ 6,666.00
Medardo Par the sum of	\$10,000.00
Gabriel and Lydia Villa the sum of	\$10,000.00
Ireneo and Gavina Valenzona the sum of	\$10,000.00
Primitivo Madriaga the sum of	\$10,000.00

CHILTON CLARK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding

APPEARANCES:

CHILTON CLARK, appearing on his own behalf

RICHARD CARTY, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 1 September 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Clark, the New Home Warranties Plan Act under Section 13(1) provides that warranty you were depending on and it reads:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

but the operative section as far as your complaint is concerned is section a(1) "is constructed in a workmanlike manner and is free from defects in material." Now despite the Ander report, the Fernbrook opinion, it may be that this wood is defective, I don't know and it may well be that you have a claim against the builder on that basis. The wood may be green, maybe this is the cause of it. But unhappily as far as your claim is concerned, the Act provides that:

Section 13(4)

A warranty under subsection (1) applies

only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

The Program was not notified until July in the following year and that was not within the one year period. It is unfortunate that perhaps you did not know the requirement of the Act and unhappily, the Act applies to any claims under that section which comes under the one year warranty. I have to find unfortunately that your claim cannot be allowed against the Program and when I say that Mr. Clark, I am not giving any opinion with regard to any claim which you might have against the builder. That is an issue with which we are not concerned.

By virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow this claim.

The above decision and reasons therefor were orally given by the Vice-Chairman at the conclusion of the hearing.

JOHN R. COLLINS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

JOHN R. COLLINS, appearing on his own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF 6 November 1992
HEARING: 23 July 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant John R. Collins from certain decisions of the Ontario New Home Warranty Program with regard to claims put forward by him alleging warrantable defects in a new home bought by the Applicant and his wife Stella Collins from a builder/vendor Oakwood Custom Built Homes Limited pursuant to an Agreement of Purchase and Sale, a copy of part of which is found at tab 1 of Exhibit 5. We do not have a copy of the page setting the date of closing of the transaction, but it is agreed that the transaction was closed on May 9, 1990 and the warranties set out in the Ontario New Home Warranty Plan Act began to run from that date. It is to be noted that Stella Collins is shown as a joint purchaser of the property and that she is not a party to these proceedings. No issue was made as to this, however, by the Program and the Tribunal will deal with the claims of the Applicant on the basis that he is entitled to recover the whole of whatever claims he is able to establish at this hearing.

From the time of the closing of the transaction until the bringing of this appeal, the Applicant put forward a considerable number of complaints as to defects, the Program allowed quite a number of them as being warrantable, and retained its own contractor, Mr. Jack Boudreau, to do remedial work at this home. In fact, as appears from the second last paragraph of a letter dated March 20, 1991, from Mr. Robert Hart, Regional Manager of the Program in Hamilton:

The original conciliation was extremely lengthy and detailed, resulting in a contract being awarded in excess of \$30,000.00. On the day that we awarded the contract, you hand-delivered another list of some twenty-five complaints which needed to be verified and an additional estimate obtained. We are still waiting for that estimate from our contractor.

This letter is found as the second document at tab 6 of Exhibit 5. By the time of this appeal, most of the items had been satisfactorily repaired, but there remained a list of items concerning which the Applicant still has complaints and they are the items in issue in this appeal. At the outset, the Applicant outlined five complaints for the Tribunal and went on to add and refer to certain other complaints to which reference is made in a letter dated September 16, 1992 from the Program to the Applicant, a copy of which is found at tab 2 of Exhibit 5, the same being items from Work Schedule "B" dated January 14, 1991, numbers 1, 43, 52, 72, 12, 11, 30, 59, 67 and 68 and items from Work Schedule "B" dated February 19, 1991, numbers 12 and 5.

The first of the five listed items at the outset was:

1. A complaint that there is an unacceptably high level of lead content in the solder used on the copper piping which in turn results in an unacceptably high level of lead content in the water.

In a letter dated March 13, 1991 to the Program, the first document of tab 6 of Exhibit 5, the Applicant alleged the lead contents of this solder to be 50.8% while the allowable maximum under the applicable plumbing Code was .02%. The Applicant said he had had a test made of this solder, but he did not call as a witness the person who made the test. On the first day of the hearing in November of 1992, counsel for the Program undertook to have a proper test made of this lead content of the solder and of the water and to deal with this issue on the basis of such tests. On the second day of the hearing, the Program called, as a witness, Mr. A.V. Forde, President of Forensic Engineering of Burlington who presented a report, Exhibit 20 herein, resulting from his testing of this solder and water. Mr. Forde is a consulting chemist who graduated from McMaster University as a chemist and became a member of the Society of Professional Chemists which has a status similar to that of a professional engineer. He has been a chemist for 43 years, has operated a chemical laboratory for 33 years and has done consulting work since 1968. The Tribunal found him to be qualified as an expert witness in the field of enquiry of concern herein.

Mr. Forde outlined for the Tribunal the tests which he conducted and the results obtained, all of which are set out in his report. He said that all of his tests showed that the amount of lead content of both the solder and the water was well within allowable guidelines. Specifically, the lead in the solder was .72 milligrams per kilogram which is .072% lead while the allowable percentage as noted above is .2%. From five samples of the drinking water taken, being 100 millilitres each from the tap, the water having sat overnight, and being the first and second 100 millilitres one taken after running one minute and one after running after three minutes and one after six minutes, all but the one after three minutes showed less than .005% and this one showed .02%. The maximum allowable concentration of lead in drinking water is .05 milligrams per litre. The test of the Municipal water supply at the water plant is less than .005. Upon this evidence the Tribunal must find that the Applicant has not made out his case concerning the lead content of this solder and the resultant allegation with regard to the water.

The second of the five listed items at the outset was:

2. The garage as built and delivered to the Applicant was not as large as it was stipulated to be.

The required dimensions of this garage are shown on the second sheet of Schedule "C", attached to the Agreement found at tab 1 of Exhibit 5. They are shown as 18' wide and 20' long, inside measurements. In fact, the actual dimensions as built are 17'4" wide and 18'5" long. It was the Applicant's evidence that his family has two cars and a pick-up truck and he should have been able to get two vehicles into his garage but, because of the smaller size, he can only get one in. The first complaint as to the size of the garage is contained in a letter from the Applicant received by the Program on November 18, 1991 being the last document in tab 6 of Exhibit 5. The evidence was that the Program offered the Applicant \$1,350 as compensation for this item and he agreed to this amount but this settlement was not completed because it was accompanied by an offer to settle some other items upon which agreement was not reached. In his argument, the Applicant said that he disagreed with this sum because it would cost a great deal more to enlarge the garage. It was the position of the Program that nothing can be recovered for this claim because the complaint is not warrantable. The issue to be determined is whether it comes within Section 14 of the Act. If it does, it must come within Section 14(1)(b). The warranty to which reference is made there is a warranty provided by Section 13(1) and if this is to apply it must be Section 13(1)(a)(i). There is no evidence of any defects in materials used so this issue comes down to whether this discrepancy in dimension amounts to construction in an unworkmanlike manner. The Tribunal was not referred to any

authorities on this point but it has come to the conclusion that the words used by the Legislature that every vendor warrants to the owner that a home is constructed in a workmanlike manner were not intended to cover a situation such as we have here. Therefore the Applicant cannot succeed with this claim.

The third of the five listed items at the outset was a complaint that the house was constructed larger than stipulated resulting in increased heating and air conditioning costs and increases assessment and, therefore, Municipal taxes. No specific evidence was provided by the Applicant as to the amount of increase resulting under any of these headings specifically, the evidence of the Applicant was that the house was supposed to have 2,167' and in fact has 2,400 square feet. The Tribunal finds that the Applicant has no cause of action against the vendor for this as, in fact, he received more than he paid for and there was no breach of warranty under Section 14(1)(b) and no recovery can be made for this item.

The fourth of the five listed items at the outset concerned the support in the basement of the internal bearing walls of the house and specifically that the studs supporting these walls, are supported, in turn, at the bottom upon pieces of wood embedded in the concrete basement floor and that these are not protected by any vapour barrier which constitutes a breach of the Ontario Building Code which does require a vapour barrier. A photograph (Exhibit 10 above) shows a piece of the wooden base in the concrete floor upon which the studs are set. The decision which the Tribunal must make concerning this item appears to be the same as that involved in the case of Dan Vera (1988) 17 CRAT 185 in which the Tribunal stated:

Mr. Vera's sole complaint is that the rebricking was done at a temperature less than 5 degrees centigrade during installation and/or less than 48 hours after installation, the whole in breach of subsection 9.20.16.1 of the Ontario Building Code.

While the work was carried out in a workmanlike manner and was free from defects in material, Mr. Vera has claimed unspecified damages under section 13(1)(a)(iii) of the Ontario New Home Warranties Plan Act because of the alleged breach of the Ontario Building Code.

The Tribunal notes that both Mr. Vera and his agent refused to specify the amount of damages to which Vera was entitled. They

also admitted that no financial loss had been suffered as a result of any breach.

Section 14 sets out the authority of the Tribunal in granting compensation to an Applicant. Section 14(1)(b) states that "an owner has a cause of action against a vendor for damages resulting from a breach of warranty." Even if we assume that a breach of warranty has occurred, Mr. Vera, by his own admission, has suffered no damages resulting from the said breach. Under the circumstances, he has no claim for damages against the Ontario New Home Warranty Program.

We have the same situation here. While there is clear breach of Section 13(1)(a)(iii) of the Ontario New Home Warranties Plan Act, there is no evidence of any damages suffered by the Applicant and, therefore, no recovery can be made upon this claim.

The fifth, and last of the five listed items at the outset concerns the front door chimes. The complaint here is that the Applicant paid \$100 extra to the builder/vendor to get a 100 tune chime and he only got the regular one which was said to be 25 tune. The evidence establishes that, on or about November 1, 1989, the Applicant did make an agreement with the vendor for the provision of the 100 tune door chime as an extra. The Applicant said that the cost to him of the extra was \$100 and he paid this to the vendor. This is corroborated in a recital in an agreement between the parties of March 6, 1989 to which I shall refer. The Tribunal therefore finds that, as of November 1, 1989 or thereabouts, the vendor had assumed an obligation to provide this upgraded door chime and had been paid \$100 to do so.

The next relevant evidence on the point is found in the aforementioned agreement of March 6, 1990 between John and Stella Collins, Oakwood Custom Built Homes Limited and Frank DiBenedetto and a third party Uniquel Furniture Manufacturing Ltd., a subcontractor which was installing the cabinets in the house. A copy of this agreement is the second document forming Exhibit 12 herein. The last recital of this agreement reads:

AND WHEREAS the purchasers have provided the vendors with the sum of \$45,410.00, to date of which \$5,000.00 was the initial deposit, \$20,000.00 was provided for excavation work, \$10,000.00 was provided for brickwork (however the vendors acknowledge that the purchasers shall

receive a credit of \$10,200.00 in respect of same, pursuant to the written Agreement dated February 6th, 1990), \$7,710.00 provided on or about November 1st, 1989, in respect of a number of upgrades including oval leaden front door, 100 tune door chime, partial payment of bricks, ceramics in two bathrooms, skylight in main bath, and glass clad (to R17), and \$2,500.00 for upgraded fireplace;

.....

Two of the operative paragraphs in the agreement read:

2. The vendors further agree that the 2 1/2 ton central air conditioning unit, air cleaner, three french doors in dining room and two french doors in family/living room will be included in the purchase price and not be considered as extras, and that the purchasers will receive by way of an adjustment on closing credit in the sum of \$54,510.00, which is comprised of monies already provided by the purchasers in the sum of \$45,410.00, an \$800.00 credit in respect of light fixtures, and \$8,300.00 in respect of monies which will be concurrently paid to unigual for all cabinets.

.....

5. Except as may otherwise be provided for herein, the original Agreement of Purchase and Sale is hereby confirmed and ratified by all of the undersigned.

6. Each of the parties acknowledges that he or she understands his or her respective rights and obligations under this Agreement and the nature and consequence of it, is signing it voluntarily and has either had independent legal advice, or has had a reasonable opportunity of obtaining same.

The effect of all of these provisions in this Agreement is that the purchasers are given credit against the final purchase price for all of the monies they have paid to that date including the \$7,710 for upgrades on or about November 1, 1989 which upgrades included this 100 tune door chime, the purchasers are to receive in

return for the total purchase price what they originally bargained to get, plus the extras listed in paragraph 2 being the two and half ton central air conditioning unit, the air cleaner and the three french doors in the dining room, and two french doors in the family/living room and that otherwise the terms of the original agreement are to prevail and further that all of the parties acknowledge their rights and obligations under this agreement. It is clear that "Upgrades" mentioned in the recital aforementioned which are not mentioned in paragraph 2 of the agreement are no longer an obligation of the vendor to provide them, and these are the oval leaden front door, the partial pavement of bricks, the ceramics in two bathrooms, the skylight in the main bath, and the glass clad (2R15) and the upgraded fireplace as well as this 100 tune door chime with which we are concerned. Accordingly, while the Applicant had contracted on November 1, 1989 to get this 100 tune door chime for the consideration of \$100 which he paid, he later on March 6, 1990 contracted out of this right in consideration of the credits allowed to him and his wife and he cannot now succeed with this claim.

We come now to the various claims based upon the numbered items in the Work Schedules, the first being Work Schedule "B" dated January 14, 1991. The first of these is item number 1 with which the Program dealt on the first page of its decision letter dated September 16, 1992 found at tab 2 of Exhibit 5.

Item #1 - Repair the mortar joint voids randomly located throughout the ceramic tile floor in the kitchen and front hall

In his evidence, Mr. Collins said that the mortar between these ceramic tiles is coming out and that the tiles are loose and that the Program's contractor, Mr. Boudreau has tried to fix them by putting wooden pieces under the tiles and gluing them down to these. He said that now about 20 one foot square tiles are loose and there are more areas where the grouting has come out. He also complained that they had put an epoxy glue under the loose tiles and did not cover the divisions with grouting so that the glue shows in a dark colour and this is unsightly. Finally he complained that some of the tiles were cracked.

Mr. Boudreau, in his evidence, stated that his men replaced all of the cracked tiles which they saw and that they changed the grouting all at once. He said that the grouting was applied after and on top of any glue to be seen between the tiles. Mr. Roccatagliata, the conciliator with the Program, who dealt with these claims said that when he inspected this item after Mr. Boudreau had done his work, he could not see any defects in it and this was also the evidence of Mr. Boudreau. Upon all of this evidence, the Tribunal must conclude that the only possible defect

to be found would be in the unsightly appearance of these tiles as the result of dark lines showing. Without any pictures to show how pronounced the dark colouring is, it is impossible to tell whether this is a defect sufficiently serious to come within Section 13(1)(a)(i) and since the onus of proof is upon the Applicant, he cannot succeed with this claim.

The next one with which he dealt is Item 52 with which the Program deals on page 2 of the decision letter of September 16, 1992 and which reads:

Item #52 - Extend the damp-proofing to terminate at grade level

Mr. Collins said that this was dealing with the same problem as item #12 found on page 3 of this letter of September 16, 1992 and as item #43 on page 2 which read respectively:

Item #12 - Eliminate the water penetration through the foundation walls.

and

Item #43 - Repair the parging of the foundation walls.

With regard to item #52 following the original inspection, the Program stated in the Work Order, "The Warranty Program will apply an adhesive sealer to the exposed water-proofing on the west foundation wall and then apply a brush coating on to match with other foundations."

With regard to item #12, the Program stated:

The Warranty Program had their contractor do repairs at the north/west corner and around the fruit cellar to eliminate water from penetrating into the basement. These repairs were completed sometime in the Spring of 1991. No further complaints were received by the Warranty Program in regards to water penetration till June of 1992. The Warranty Program informed their contractor to investigate to see if the repairs made had failed. The contractor reported back to the Warranty Program that his repairs were fine and that the new water penetration was due to a sewer back-up. The Warranty Program will do no more repairs for water penetration.

With regard to item #43, the Program stated:

The Warranty Program will remove any loose brushcoating and re-apply a new layer.

The evidence of Mr. Boudreau and Mr. Roccatagliata establishes that the original complaints as to water penetration were near the northwest corner of the house and into the fruit cellar and that these were properly repaired by Mr. Boudreau. Mr. Boudreau said that he excavated around the front porch and repaired three sites for water penetration, two on the fruit cellar wall and one on the northwest wall towards the corner. No further complaint was made by the Applicant until June 1992 when he called Mr. Boudreau because of water. The latter came and saw evidence of water, but this had not come through or from the areas which he had repaired. Both he and Mr. Roccatagliata said that the water on this occasion had come from quite a different source, namely a backed up storm sewer during the course of a heavy rain. The first complaint as to this defect was made by the Applicant to the Program in June 1992 and is, therefore, outside the time limited for the same. It was the evidence of the witnesses for the Program that the repairs of warrantable defects included in these three items which were made by Mr. Boudreau were completed satisfactorily and to the extent that these are shown in photographs being Exhibit 6 and Exhibits 21(a) and (b), this evidence is corroborated by these pictures. The Tribunal must, therefore, find that the Applicant has not established his claim made upon these items.

The next item is #72 with which the Program deals on page 3 of the decision letter of September 16, 1992.

Item #72 - Supply and install a rail for the front entrance step.

When the precast railing at the front step was put in place originally, there was a join between two of the pieces which was not finished so that these two pieces were not fastened together. In dealing with this in the Work Order, the Program said:

The Warranty Program will repair the cracked junctures where the precast front railings join together.

Mr. Boudreau, in fact, did glue them together, but the problem is that the material he used was of a darker colour and the Applicant complains that it is unsightly. For something in this category, it must be considered more serious because it is in quite a prominent place - the railing on the front steps is one of the first things anyone sees when coming to the house.

In his evidence, Mr. Boudreau did not deal specifically with this item although he did say generally that when he looked at all of the work he had done and considered it in the light of the Applicant's subsequent complaints, in his opinion none of these constituted warrantable defects. Mr. Roccatagliata's evidence was that the repairs to this railing were to an acceptable tolerance in that there were no defects or breaches of the Ontario Building Code. He did not contradict the evidence of the Applicant that the repaired join was of quite a different colour than that of the railing. In his argument, counsel for the Program said that this claim should be dismissed on the ground that the only real complaint is as to appearance. The Tribunal finds that the only real complaint here is as to appearance, but cannot accept the proposition that all such complaints cannot succeed. There can be and are cases where defects which are defects in appearance do constitute defects in workmanship within the meaning of Section 13(1)(a)(i). The question in each case is whether the defect in question is sufficient to be put in this category. It may well be that the cost of remedying this defect (perhaps with some paint -we had no evidence as to how it should be done) is so small that it does not justify the time spent on this item at this hearing or in this judgment, but the principle is of some importance and the Tribunal does find with regard to this item that its appearance, in such a prominent place is not something which an owner should have to accept. Therefore, the Program should be responsible to see that this unsightly join is remedied by the means most effectively and economically available to do so.

The next is item #11 noted on page 4 of the decision letter of September 16, 1992 and found on the second page of Work Schedule "B" dated January 14, 1991 at tab 5 of Exhibit 5:

11. Complete the exterior caulking throughout the home in accordance to Ontario Building Code requirements.

The Applicant in his evidence stated that his complaint is of cracks in the caulking. Mr. Boudreau said that when he first attended to make repairs at the home, he had pointed out to him or saw areas requiring recaulking and he did all of the work in a proper manner. When he was back on August 4, the Applicant had more complaints about this caulking and he, Mr. Boudreau, corrected all of the problems apparent at that time. Caulking is an item requiring some maintenance over a period of time. It was the evidence of Mr. Roccatagliata based on his inspection of the premises that Mr. Boudreau properly repaired this item and that responsibility for subsequent requirements in this area cannot be fixed as the responsibility of the vendor or of the Program or of its contractor.

The Applicant did not provide evidence at this hearing upon which such responsibility can be fixed and this claim cannot succeed.

The next is item #30 on page 4 of the letter of September 16, 1992 and is found on page 3 of the Work Schedule at tab 5:

30. Complete the trim, paint and drywall the laundry room foyer.

On this item the Applicant said there were holes in the trim not properly covered throughout the home. It is wooden trim stained and not painted, fastened with countersunk finishing nails. He said some of the holes are not filled at all and some are filled with a material sufficiently off in colour as to appear unsightly. Exhibit 13 is a photograph said to depict one of the worst examples of this complaint. Mr. Boudreau said that these were not nail holes but holes or marks in the wood. He said that where they were of sufficient consequence, he did fill them and stained over them. He said that he mixed up a colour of fill best calculated to match throughout the house, and that his work was done properly and within the required warranty. Mr. Roccatagliata said that in his opinion, the final result was quite within acceptable standards. A view of Exhibit 13 appears to confirm that these are not all nail holes (it is improbable that anyone would drive in so many nails to hold this part of the trim in place) and that, if this is one of the worst examples, the result is within tolerable standards and does not constitute defective workmanship.

The next is item #59 to which reference is made on page 4 of the letter of September 16, 1992 and is found on the eighth page of the Work Schedule of January 14, 1991 at tab 5 of Exhibit 5:

59. Supply and install gravel in accordance to the Offer of Purchase and Sale.

The evidence of the Applicant was that there was not enough gravel supplied in the driveway and particularly that, at the garage door, the lip of the concrete floor of the garage was 4" above the level of the gravel causing a bump and sharp edge of this height for the tires every time a vehicle went in or out of the garage. Exhibit 8 is a photograph which in fact does show this situation and corroborates the evidence of the 4" drop. Exhibits 22A, B and C also show this driveway. Exhibit 22A shows the gravel raked up to the door so that the drop is less, if any. Exhibit 22B shows some drop, but not as much as in Exhibit 8 and Exhibit 22C shows approximately the 4" drop again.

Mr. Roccatagliata said that he dug down and found the depth of the gravel in the driveway to be 8" to 10" which was quite adequate to provide a proper driveway and proper support for a hardtop finish. Mr. Boudreau said that his men poured the concrete floor and left the situation as shown in Exhibit 22B with the top of the gravel 1 and 1 1/4" to 2" from the level of the floor, not unusual for an unfinished driveway. If a finished top is to be put on it, the level of the gravel can easily be adjusted to bring the top of it level with the floor and, of course, must be lower to do this and, if it is not to be finished, it is easy to rake the gravel to eliminate this bump. It was the submission of counsel for the Program that this item comes within Section 13(2)(h) of the Act which reads:

(2) A warranty under subsection (1) does not apply in respect of

.....
 (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;

It is not clear on the evidence whether the lower level of the gravel resulted from being put in in that way in the first place or from subsidence later. The only evidence of its depth is that given by Mr. Roccatagliata as noted above and the Tribunal must, therefore, find no defect in this respect. If it was put in with the discrepancy in height in the first place (which seems the probability), this was reasonable for an unfinished driveway and if the discrepancy resulted from subsidence then it comes within the exception and, therefore, the Applicant cannot succeed with this claim.

The next item is #67 on page 4 of the letter of September 16, 1991 found on the ninth page of Work Schedule "B" of January 14, 1991 at tab 5 of Exhibit 5:

67. Weatherstrip the garage to laundry room door.

The Applicant said that this is a magnetic form of weatherstripping around a rear door between the laundry room in the house and the garage and for some reason it keeps ripping. In November 1992, it had been replaced four times and at the first day of the hearing, there was a piece 8" long at one of the hinges ripped out of place. The importance of this item is increased by the fact that the main purpose of this barrier at what is an interior door of the premises is to seal out of the house noxious fumes which may originate in the garage. There was no denial of any of these facts by any of the witnesses for the Program. The

defence to this claim put forward by counsel for the Program is that by this time problems with the weatherstripping are a matter of wear and tear and, therefore, ordinary maintenance on the part of the owner.

The Tribunal is not able to agree with this submission. It is a reasonable inference from the evidence that there is something wrong with the construction of this door and its weatherstripping to require five sets of repairs from May 1990 to November 1992. Particularly because of the requirement of a proper seal between a garage and a house if they are connected, as here, this item is of consequence and the Tribunal must find that the Program has a responsibility here to have the cause of the problem identified and remedied.

The next item is #68 on the fourth page of the letter of September 16, 1991 and found on the ninth page of the Work Schedule at tab 5 of Exhibit 5:

68. Repair the holes in the gable end of the sink upper cabinets.

In his evidence on this claim, the Applicant's complaint was somewhat different from what is indicated in item #68 as outlined by the Program. His complaint was as to improper wiring of a fluorescent light placed under the bottom of the cabinets and right over the sink. We have photographs of this complaint in Exhibits 9A and B. The evidence of the Applicant was that these are not installed in accordance with the requirements of the Ontario Building Code and indeed, the photos show these wires to be not very well fastened in place. The Tribunal was not provided with the section of the Ontario Building Code said to be breached. When discussing how he had dealt with this item, the Applicant said he sought an inspection by Hamilton Hydro of this to get the correct facts and opinion and was told he must pay \$50 for this. He did not proceed to do so because he said he could fix it cheaper himself. It was the evidence of Mr. Roccatagliata, who inspected this item, that the Applicant does not establish a breach of the Code herein. It was the submission of counsel for the Program that the Applicant has failed to meet the onus upon him to establish the claim and in the absence of evidence of the precise requirements of the Code and of the specific breaches thereof, the Tribunal must agree and direct the disallowance of this claim.

The next item is from the second Work Order, Schedule "B" dated February 19, 1991 being item 12 therein found at page 4 of the letter of September 16, 1991 and at the second page of Work Schedule "B" dated February 19, 1991.

12. Ensure that the south edge on the laundry room cabinets has been properly secured.

In the decision letter, the Program deals with this item in the following terms:

Item #12 was repaired in March of 1991 and the damaged edge of cabinet was not mentioned until the latest re-inspection. Nothing was reported to the Warranty Program within a year of the repair. No further obligation is required on behalf of the Warranty Program.

Mr. Boudreau dealt with this claim and said that he did the remedial work properly to these cabinets and that there was no suggestion of any further problem until the re-inspection on August 4, 1992. He said that the damage which was brought to his attention at that time was not there when he completed his work previously. Upon all of the evidence on this point, the Tribunal must find that the conclusion as quoted above by the Program in its decision letter is correct and this claim must, therefore, be disallowed.

The next item is item #5 from the re-inspection report dated September 30, 1991 to which reference is made on page 5 of the decision letter of September 6, 1991 at tab 2 of Exhibit 5.

Item #5 - The caulking of the kitchen window.

Exhibits 23A, B and C are photographs taken of this kitchen window by Mr. Boudreau to show what is at issue here. He said that he inspected this complaint and could see no defect whatsoever. The photographs appear to corroborate this conclusion and this claim therefore has not been established.

Finally the Applicant complained of stains on the stairway being what he said were certain mortar stains and certain paint stains. A photograph, Exhibit 11, shows some white substance on part of these stairs and some dark marks which presumably are the paint stains. Mr. Boudreau said that he had no knowledge as to what caused any of these. He said that the white substance appeared to be a drywall compound rather than mortar and he had nothing to do with any drywall work in the house. There was no evidence of anything being done with drywall since the work of the original builder or his subtrades and if the damage was there, then it was certainly not reported on time. In fact, no evidence was given as to when or how either of these stains came upon the stairs and in these circumstances, it is impossible to fix responsibility upon the Program for them.

Accordingly, pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal hereby directs the Ontario New Home Warranty Program to:

- 1) take the necessary and appropriate steps to identify what remedial action is required to render the railing at the front entrance step of a sufficiently uniform colour to meet its warranty obligations of construction in a workmanlike manner to carry out such remedial work;
- 2) take the necessary and appropriate steps to determine what is causing the continued failure of the weatherstripping on the door between the garage and the laundry room in the house and to remedy this defect;
- 3) otherwise disallow the claims of the Applicant herein.

EDGAR COWIE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GERRY BEECH, Member
HANS KEPPLER, Member

APPEARANCES:

EDGAR COWIE, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

MARCELLO DIFRANCESCO, representing Bay-Tower
Management Ltd.

DATE OF

HEARING: 10 December 1992

Toronto

REASONS FOR DECISION AND ORDER

The issues in this case are that the claim was made beyond the time limited under the Act and in any event there were no defects in workmanship and material.

The homeowner took possession of his home on May 11, 1987. In June and July 1987, the Program was forwarded a written list of deficiencies and in May 1988, a conciliation request was made by Mr. Cowie. In June 1988, Mr. Cowie advised the Program that the builder had done all of the repairs and therefore cancelled the conciliation request. In July 1990, a further letter was sent to the Program setting out deficiencies in writing and in May 1991, Mr. Cowie requested a conciliation which occurred on June 12, 1991. The homeowner in 1991 had nine complaints and the issue therefore was whether these complaints were new complaints or related back to the original complaints made within the first year of occupancy; secondly, was there an inordinate delay from June 1988 when Mr. Cowie advised the Program that the builder had completed all repairs until July of 1990 when the subsequent complaint was issued to the Program; and thirdly, if the complaints related back to the original complaints filed within the time limit of the Act and there was not an inordinate delay, were there defects in workmanship and material?

At the commencement of the hearing, Mr. Cowie indicated that the first complaint concerning the windows not opening had been resolved between him and the builder.

The Tribunal requested Mr. Cowie to identify complaints referred to in his July 1990 complaints in his original complaints filed within the first year of possession as otherwise unless such complaints were of a major structural defect, the complaints would be barred by the statute as not having been filed in writing with the Program within the first year of occupancy.

After a considerable period of time, Mr. Cowie was able to draw to the Tribunal's attention only two complaints which fell within the category of having been raised within the first year of possession; namely, complaint number 4 dealing with a crack in the bedroom wall and complaint number 9 in respect to a crack on the west wall of the garage. Evidence before the Tribunal indicated that the builder had re-attended at the site and repaired defects complained of by Mr. Cowie in his original complaints to the builder and to the Program. With respect to the two complaints which were continued by Mr. Cowie, he testified that the cracks in both the garage wall and the bedroom wall had increased in size from 1988 until 1991 when the conciliation occurred. The evidence of two witnesses from the Program, who attended on the conciliation in June 1991, both testified that the cracks were both hairline and resulted from normal shrinkage. A photograph of the crack in the west garage wall indicated that it was located in the mortar and was of a very minor nature.

On the balance of evidence submitted to the Tribunal, this Tribunal cannot find that there was a defect in workmanship or material, and that the burden of proof being upon the homeowner, Mr. Cowie, to prove his claim to the reasonable satisfaction of the Tribunal has failed.

The Tribunal was referred to two cases decided by this Tribunal - the Talosi case (see A. Talosi (1991) 22 CRAT 950) and the Senior case (re Rod Senior released December 4, 1992). In both of those cases where repairs were effected by the builder, this Tribunal has ruled that although no specific time for further complaint is provided in the Act, nevertheless a good rule of thumb applicable to any defect in such repairs would be those periods of time established by the Act for submitting written complaint with respect to a new home. In this case, although Mr. Cowie indicated that he made a number of telephone calls to the builder's offices after June 1988, he failed to make any complaint to the Program until July 1990 more than two years later. Under these circumstances, had we found that the complaints in 1990 of the homeowner had been warranted, we would have agreed with the decisions in the Talosi and the Senior cases that Mr. Cowie had

failed to report such defects in repairs within a year of their having been completed.

Pursuant to the authority vested in it under the Act, therefore, the Tribunal hereby directs the Program to disallow the claim of the homeowner.

KEN CURLE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RONALD J. POIRIER, Vice-Chairman, Presiding

APPEARANCES:

KEN CURLE, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 29 October 1992

Thunder Bay

REASONS FOR DECISION AND ORDER

Upon hearing the evidence in this appeal and upon reviewing the documents, photographs and plans submitted by the parties, the Tribunal concludes that the appellant's claim for substitution of brick work with respect to the front elevation siding is denied.

Accordingly by virtue of the authority vested in the Commercial Registration Appeal Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

ALFRED DALTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RONALD J. POIRIER, Vice-Chairman, Presiding

APPEARANCES:

ALFRED DALTON, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 22 October 1992

Thunder Bay

REASONS FOR DECISION AND ORDER

Upon hearing the evidence in this appeal and upon reviewing the documents, photographs and plans submitted by the parties, the Tribunal concludes that the appellant's claim with respect to the hairline cracks in the basement wall of his house is denied.

Accordingly by virtue of the authority vested in the Commercial Registration Appeal Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

R. DEL BALSO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
SELWYN CHARLES, Member
D.H. MACFARLANE, Member

APPEARANCES:
STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 5 August 1993 Toronto

REASONS FOR DECISION AND ORDER

In view of the circumstances and the fact that the Applicant R. Del Balso has failed to appear and the onus being upon the Applicant to prove the claim against the Program, this Tribunal finds that there has been a failure to prove such claim and, therefore, directs the Program to disallow the claim of this Applicant.

The above decision and reasons therefor were orally given by the Vice-Chairman at the conclusion of the hearing in the presence of the other members who concurred.

MARIA DI STEFANO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GERRY BEECH, Member
JOHN HURLBURT, Member

APPEARANCES:
STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 5 January 1993 Toronto

REASONS FOR DECISION AND ORDER

No one appearing for the Applicant by 10:00 o'clock in the forenoon, upon the application of counsel on behalf of the Respondent, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicant.

The above decision and reasons therefor were orally given by the Vice-Chairman at the conclusion of the hearing in the presence of the other members who concurred.

MR. AND MRS. CARMEN DONATO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:

MR. AND MRS. DONATO,
appearing on their own behalf

IAN ANDERSON, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 14 January 1993 Toronto

REASONS FOR DECISION AND ORDER

Within seven months of taking possession of their new home at 102 Huntingwood Avenue, Dundas, Mrs. Helen Donato advised the New Home Warranty Program of her complaint concerning the carpet which she said "has already flattened". In a letter of July 3, 1992, in response to the Warranty Program's decision to deny the claim she said "Carpet worn like - worn - like areas throughout the house. We are unable to accept the decision of the Warranty Program that areas of concern are from normal wear and tear within six months of installation."

In her evidence, Mrs. Donato said that she observed worn areas appearing after six month's possession. Senator Homes on being advised had sent out a representative from Cardinal Flooring. His observation was that the areas were matted, pooled and soiled. Ross Bruno also of Cardinal Flooring told her that he thought people walking in bare feet caused the matting. She was, however, advised to invite the manufacturer to examine it and one William Boyd attended at the home. Mr. Boyd, representing the Peerless Carpet Company, told her that the matting appeared in the high traffic areas and was caused by people turning and twisting on the carpet.

Mrs. Donato, dissatisfied with these findings, had the rug inspected by someone from Dundas Rug Company and one Rob Bishop from Maple Leaf and Greenville. It appears she also had further

inspections made by a Jeff Swazey of Russ Hayes Company and a Shirley Lachlechen of Sears. We do not, however, have the benefit of their opinions since none of them have been called to give evidence. Nevertheless, the evidence of Mr. Donato supported her claim when he said "The carpet looks worn and is in fact worn."

Giving evidence on behalf of the Program, Ross Bruno, President of Cardinal Floor Coverings said he had supplied Senator Homes, the builder concerned, with the particular carpet in issue. It is a type 35 oz. polyester, the same as those installed on all the Senator Homes in the subdivision. He said the carpet known as Montebello Supreme was installed in 2,000 to 2,500 homes per year. He was at the Donato home on four occasions. The first time involved no complaint about where, but Mrs. Donato simply called it a lousy carpet and then allowed his men to fix it wherever it needed repair. He was called again some four months later with the complaint that the carpet was wearing out. He attended and saw one area crushed and put his hand over it and felt it was just dirty. He said high traffic areas, three of them between the kitchen and the dining room, were involved and these were areas where people tend to turn and mat the carpet down. He contended that all he saw in those areas was that the carpet was matted down. The builder, however, asked him to get the manufacturer and so he and one Bill Boyd inspected the carpet. Their joint opinion was that the carpet was matted down due to dirt and usage. On the last occasion, he attended with a HUDAC representative and a person from Peerless, together with the Donatos and someone from Senator Homes, but the opinions he had previously expressed had not changed. He said that he attended again one last time, but at that point the Donatos would not let him into the home.

Mr. William Boyd with the Peerless Carpet was in the sales division of that company and had been in the carpet industry for forty years. He said that he was in the Donato home on two occasions and on the first occasion, he noticed that the areas complained of bore heavier traffic than other areas. He observed the carpet had crushed and distorted a bit, but it was certainly not worn and there were no manufacturer's defects. On a second occasion with Mr. Rotaglio and Mr. Bruno, he gave the same opinion and this would appear to conform with the opinion of the three of them.

Mr. Rotaglio, on behalf of the Program, gave evidence to the effect that he was employed as a claims administrator by the Program in Hamilton and Kitchener. He was the conciliator at the time of the first visit to the home and on that occasion, he went down on his hands and knees to examine the carpet as closely as possible. He said it was matted in the entrance to the kitchen, the staircase, although the treads were not too bad. He said that normal wear and tear is the cause of the matting.

He had recommended to Mrs. Donato that regular vacuuming was necessary and advised her that this is a higher standard of carpet than usually employed. He pointed out that there were no unusual signs of wear in the carpet and there was certainly no manufacturing defect in its composition or in its installation.

The evidence brought by Mr. and Mrs. Donato is simply their own contention that the carpet is defective because there are areas where this carpet is matted. The claim, however, is based on Section 13(1) of the Act and we find as a fact on all the evidence, there is no defect either in workmanship or installation. The material appears to be of better than average used in many homes and there is nothing in the workmanship that we can find to be defective.

The claim, therefore, must fail and we hereby disallow it. With regard to another matter, we note that the Program has undertaken to varnish the kitchen floor and this has not been persued by the parties and we leave it to the Program to deal with it in due course.

TIM DUNDAS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GERRY BEECH, Member
EDWARD WEISZ, Member

APPEARANCES:
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 13 April 1993 Toronto

REASONS FOR DECISION AND ORDER

In view of the circumstances and the fact that the Applicant Tim Dundas has failed to appear and the onus being upon him to prove his claim against the Program, this Tribunal finds that there has been a failure to prove such claim and, therefore, directs the Program to disallow the claim of this Applicant.

The above decision and reasons therefor were orally given by the Vice-Chairman at the conclusion of the hearing in the presence of the other members who concurred.

LOUIS FELDHAMMER and
MS. G. JEANNE MCGUIRE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding

APPEARANCES:

L. FELDHAMMER and G. JEANNE MCGUIRE,
appearing on their own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 10 March 1993

Toronto

REASONS FOR DECISION AND ORDER

The facts are as follows. The Applicants Mr. Feldhammer and Ms. McGuire obtained title to a piece of property in the Township of Rawdon in the County of Hastings and entered into a construction contract with Ian Beattie Contracting under date of October 20, 1990 providing for a completion of a fully constructed home on April 30, 1991 for a construction price of \$237,000. The contract appeared to provide for the builder to fully complete the house with some allowances for kitchen cabinets and plumbing fixtures and electrical fixtures to the owner. The contractor walked away from the job prior to completing the construction of the home. At that time, the owners had paid to the contractor the sum of \$225,500. The Program had the value of the work appraised and came to the conclusion that the value of the work in place was \$204,184.31 producing a difference of \$21,316.69. As this amount exceeded the \$20,000 maximum for a claim under Section 14(1)(a), the Program agreed to pay to the appellants the sum of \$20,000 and this was accepted by Mr. Feldhammer and Ms. McGuire as compensation for their claim under Section 14(1)(a), but not in respect to warranty claims. A Full Release in respect to the Section 14(1)(a) claim was executed January 27, 1992 and a cheque issued for \$20,000 February 17, 1992 by the Program.

In the course of the discussions of the Applicants' claim, warranty claims were asserted by the Applicants in October 1991. A conciliation occurred on January 23, 1992 in which a number of warranted items were agreed upon and a Work Schedule "B"

was prepared by the Program for cost submission. The contractor to whom the Work Schedule "B" was submitted estimated a cost of \$8,960 plus GST in respect to warranted repairs. After a number of discussions and correspondence between the Applicants and the Program, the Applicants entered into a settlement agreement with the Program for \$8,960 under date of November 8, 1992, but exempting therefrom items 2 and 4 on Schedule A(2) of the Conciliation Report. A cheque in this amount was issued November 25, 1992 to the Applicants. These A(2) items were in respect to a deck in which the Applicants asserted that the wrong grade of wood as specified in the contract had been installed. The Program's response to this was that the twisting and warping was exempted under the provisions of Section 13(2)(d) as being normal shrinkage of materials caused by drying after construction. With respect to the Item 4 in Schedule A(2), the Applicants' complaint was that there was no dryer vent in the laundry room, no vent in the powder room, no vent in the basement bathroom, improper venting in the cold storage area and defective vent in the pool area. The Program's response was that this was a completion item which had been addressed in the financial loss settlement to the owner.

Before the Tribunal, counsel for the Program argued that the home was never completed and, therefore, no possession date could be established from which the warranty could run. Counsel also argued that Section 13(3) of the Act required the vendor to deliver a Certificate of Completion, that none was so delivered and therefore, the claimants were not owners and could not be entitled to the benefits of the warranty as they had not taken possession by way of a closing or occupancy from a vendor. Counsel also submitted that the payment of \$8,960 with respect to warranty items was simply an ex gratia payment. I find this submission startling and contrary to the policy expressed in the correspondence between the Applicants and the Program during the course of the claim disputed. Furthermore, I find it totally inequitable that counsel for the Program would submit that the only remedy to the Applicants is the maximum of \$20,000 under the provisions of Section 14(1)(a) when by the Program's own appraiser's estimate, \$201,000 of work had been completed on a \$237,000 contract. If the Program's submission is correct and the only remedy for an owner contracting with a builder to construct a home on the owner's site is the protection of Section 14(1)(a) to the maximum of \$20,000 rather than the warranty protection under Section 14(1)(b) and (c) of \$100,000, this would have the effect of voiding a "New Home Warranty" where a builder failed to complete perhaps \$5,000 worth of work, walked away from the project and refused to deliver up a Certificate of Completion and Possession, and yet many defects in workmanship and material were subsequently discovered.

If this is the intent of the Legislature, then it must be clearly spelled out in the Act.

Under Section 14 of the Act, those persons entitled to compensation are defined as follows:

14.(1) ...

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
- (c) the owner suffers damage because of a major structural defect...

(emphasis added)

It will be seen that clause (a) uses the word person and clauses (b) and (c) use the word owner in respect to those persons to whom compensation is payable. It has been argued by counsel for the Program that the clauses are disjunctive and that if one is entitled under clause (a) to damages, one is not entitled under clause (b). Many cases before this Tribunal have permitted a person under clause (b) and under clause (c) as owners to be compensated. Does the use of the word "person" in clause (a) preclude an owner from coming within this category? In my view, it does not. The Legislature in its wisdom has used the word "person" simply to ensure that someone who never becomes an owner, whether by reason of the bankruptcy of the vendor or the failure of the vendor to deliver possession is entitled to a claim under clause (a). In my view, the word person is much broader than the word "owner". A look at the definition in Section 1 clearly limits who is an owner.

Clause 1(g) defines "owner" as:

- (g) "owner" means a person who first acquires a home from its vendor for occupancy...

Clause 1(n) defines vendor as:

- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.

(emphasis added)

In my view therefore, the Legislature has clearly indicated that a landowner entering into a contract with a builder to construct a home is entitled to the warranties contained in Section 13 of the Act and entitled to compensation under the provisions of Sections 14(1)(b) and (c). If the submission of counsel for the Program were correct, a builder could easily deprive the person with whom he contracted of the warranty rights under the Act by walking away from the job toward its completion. Furthermore in addition to the remedies for breach of warranty, the Applicants in this case are clearly persons as defined under clause 14(1)(a) and are entitled therefore to remedies for the vendor's failure to fully perform the contract. In my view therefore, the payments by the Program under 14(1)(a) and under 14(1)(b) were quite properly made to the Applicants and not in any way simply an ex gratia payment.

Counsel for the Program referred me to a decision of the Tribunal, Gene and Mavis Legacy (1991) 22 CRAT 790 in which the Tribunal indicated that no cases had been submitted to it to show that the Legislature did not intend there to be a specific distinction between clause (a) on the one hand and clauses (b) and (c) on the other. I have indicated that in my view I clearly can see a reason for the use of the word person in clause (a) as being a broader coverage in that it is extended to persons who may never become "owners". On the other hand, I see nothing in the legislation which would prohibit an owner from making a claim under clause (a) in his capacity as a person suffering a financial loss by reason of the vendor's failure to complete.

The Applicants drew to my attention the decision of R.A. Hunt (1991) 22 CRAT 733 heard on November 20, 1991 in Ottawa by a panel otherwise constituted than that in the Legacy case. It is unfortunate that the Hunt decision was heard November 20, 1991 while the Legacy decision was heard November 18, 1991 and therefore neither decision was brought to the attention of the other panel.

In the Hunt decision specifically at p.736, the Tribunal addresses the question of whether a claim can be asserted under both clauses (a), (b) and (c) of Section 14 by the same individual. The Tribunal in the Hunt decision held in the affirmative and I am similarly finding in favour of the Applicants in this case.

Therefore by virtue of the authority vested in me under the provisions of the New Home Warranties Plan Act, I hereby find that the Applicants Louis Feldhammer and G. Jeanne McGuire are entitled to the payments which have been made to them under the provisions of the Ontario New Home Warranties Plan Act, and I direct that the issue with respect to the two items concerning the deck and the venting disallowed under Section A(2) of the

Conciliation Report be reviewed by the Program and if they continue to be of the view that these are not warrantable claims, the Applicants be entitled to appeal the issue and the amounts claimed by the Applicants to this Tribunal.

The above decision was appealed to the Divisional Court, and its decision is reported at 27 C.R.A.T. 1039.

MR. AND MRS. MICHAEL FERNLUND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:
ROBERT J. BANIK, representing the Applicants

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 6 January 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program, rendered December 9, 1991 to disallow the claim of Mr. and Mrs. Michael Fernlund seeking damages of \$10,000. The claim was based on the builder failing to follow the original interior layout for the home to be constructed. Instead, the builder executed a layout which was the reverse or mirror image of the building plan.

The Applicants claim that this constituted a breach of section 20 of the Regulations and was an illegal substitution under the Act. The Program claims that the reversal of the layout resulting in a mirror image did not constitute a substitution; and even if it were found that it did constitute a substitution, the Program alleges that the Applicants suffered no damages for which compensation is allowed under the Act.

Michael Fernlund was the first witness to testify. He referred the Tribunal to tab 16 of Exhibit 3 which contains certain pages of a brochure issued by the Plan. At the bottom of page 7, in the section dealing with substitutions, the Plan sets out its interpretation, in layman terms, of section 20 of the Regulations. The Program then sets out examples of builder substitutions prohibited under the Act. One such example is expressed as follows:

. reverse ("mirror image") plan

Mr. Fernlund stated that based on the pamphlet, he felt

that he was entitled to indemnification from the Plan.

Mr. Fernlund testified that he first met the builder, together with his wife, in January 1991. After a number of meetings, the parties reached an agreement on the floor plans of the home which the builder would construct for the Applicants. As appears in the floor plans filed in Exhibit 3, tab 2, the garage was to be on the right side of the home and the kitchen on the left side; on the second storey, the balcony was to be situated on the left side of the home. Having reached an agreement on the floor plans, the parties signed a purchase agreement March 24, 1991.

Mr. Fernlund testified that it was important to him that the kitchen be on the west side (left side) so that more sunlight would be allowed into the kitchen. He also wanted the garage to separate his home from that of his neighbours.

Mr. Fernlund referred the Tribunal to the last page of the purchase agreement which contained a plan of the homes to be built in his subdivision. This plan further corroborates that the garage was to be on the right side of his home.

Long after the contract was signed and only due to his visiting the site, the Applicants learned to their great surprise that the home layout plan had been reversed and had been built in a mirror image. The result was that the kitchen was now on the right hand side, facing east, where it would receive less light; the garage was on the left hand side, and the second floor balcony now almost abutted the balcony of his neighbour rather than being as far away from it as possible.

When he found this out, Mr. Fernlund spoke to the builder on site and asked why the floor plan had been reversed. He was told simply that there had been a decision to reverse the plan. Mr. Fernlund was very upset since he had been very specific about where each of the rooms was to be.

When he realized that the builder would not build according to the original plans, he had his lawyer send a letter dated June 14, 1991 in which the Applicants agreed to close the purchase of the home under the reserve of all their rights to sue for breach of the Agreement of Purchase and Sale.

On July 13, 1991, the Applicants filed a Proof of Claim with the Program seeking \$10,000 in damages.

In cross-examination, Mr. Fernlund stated that rather than attempt to cancel the purchase of the home, he and his wife closed because they had already sold their former home.

The Tribunal notes that under the Act, the Applicants were fully entitled to proceed with the closing of the home under reserve of any claim that they might have against either the builder or the Program.

The Applicant was asked why his claim was for \$10,000. To this he answered that he could not concretely establish any specific amount for his claim, but believed that the reverse image might have affected the resale value of the home. He admitted that the amount paid for the home did not change as a result of the reverse image and that he had received the exact floor space promised, as well as each of the rooms that appeared in the plan. He made no proof that the home as a result of the reverse image was worth less or that he should have been charged less as a result thereof.

The next witness to testify was Mrs. Fernlund. She declared that she was very particular on how she wanted the house to be laid out: the kitchen was to be on the west side because she wanted the maximum amount of sunlight. She was pregnant and knew she would be using the kitchen frequently.

She only found out about the house being built according to a reverse plan or mirror image at the same time as her husband. Needless to say, she was dismayed.

She testified that although the builder offered to construct the kitchen on the west side, the result would have been a kitchen that was too large and public rooms that were too small since the floor plate was already in the reverse image. She, therefore, refused the offer.

She went on to testify that her damages of \$10,000 were based on loss of privacy because the balconies were too close, as well as lack of light in the kitchen. They appear to be damages for loss of enjoyment of the home purchased.

This concluded the case of the Applicants. At this stage, the Program declared that they did not intend to lead any proof in defence of the claim. In essence, the Program asked that the Applicants claim be rejected because the proof made did not suffice to establish their claim.

Based on Mr. Campbell's declaration that the Program would lead no proof in defence, the Tribunal declared proof closed and the parties proceeded to argument.

The Program argued that the reverse floor plan did not constitute an illegal substitution as envisaged by section 20 of the Regulations of the Act.

The fact that a brochure by the Program stated the opposite could not in any way affect the application of the Act. Rights could not be created that did not already exist under the Act and a reading of Section 20, no matter how liberal, could not be construed to treat a mirror image as an illegal substitution.

Mr. Campbell went on to argue that even if the reverse image constituted a breach of the Act, the Applicants had failed to establish that they had suffered any damages as a result thereof. He stated that at no time had the Applicants quantified their claim for \$10,000 or made proof to show that they had paid a difference in price or had received a reduced value in the home they obtained; neither was any proof led that the resale value of the home had been diminished as a result of the mirror image. He went on to argue that any damages that the claimants may have suffered were not of the type that the Act allowed compensation for.

The attorney for the Applicants stated that the reverse plan constituted an illegal substitution because it could be equated to a substitution in an item of construction; viz., the model chosen was not the model that was received being a mirror image.

As for the damages, he felt that the Applicants had established their right to \$10,000 since, he argued, they could have sought the reconstruction of their home according to the original floor plan and this would have exceeded \$10,000. The Tribunal notes, however, that the Applicants in their testimony constantly refer to their damages as being loss of enjoyment because they no longer had the privacy they had wanted and because the kitchen did not face west where it would get more light.

In reaching its judgement, the Tribunal must base itself on the testimony of the Applicants and not on the interpretation thereof of their attorney.

The first question for the Tribunal to decide is whether the claim of the Applicants falls within the provisions of the Act.

The Applicants base their claim on an illegal substitution forbidden by section 20(1) of the Regulations of the Ontario New Home Warranties Plan Act. Section 20(1) reads as follows:

20-(1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.

While the pamphlet of the Program treats a mirror image as an illegal substitution, the Tribunal finds that the wording of section 20(1) clearly does not include a mirror image or a change in floor plan within its terms. A reversal of floor plan cannot be construed as being a different or substituted item of construction.

The words "items of construction" in section 20(1) refers to things such as sinks, bathtubs, doorways or doors, etc. which the purchaser has chosen. An item of construction is completely different from a plan of construction. The reverse plan construction also does not constitute a substitution in the finishing. Therefore, despite the interpretation of the Program in their pamphlet, the Tribunal finds that the reverse plan does not constitute an illegal substitution. It hopes that the Program will change their pamphlet which is very misleading.

The fact, however, that the claim by the Applicants does not fall within the parameters of an illegal substitution, does not mean that the claim itself is not permissible under other sections of the Act. The Tribunal believes that under section 14(1)(b) of the Act, the Applicants do indeed have a claim. Section 14(1)(b) reads as follows:

14-(1) Where,

.....
 (b) an owner has a cause of action
 against a vendor for damages
 resulting from a breach of warranty;

.....
 the person or owner is entitled to be paid out
 of the guarantee fund the amount of such
 damage subject to such limits as are fixed by
 the regulations.

The limits are set out in section 6(3) and section 6(6) of the Regulations.

It is clear from the evidence that the builder failed to construct a home in accordance with the floor plan agreed upon. The Tribunal believes that this constituted a breach of warranty as proscribed by section 13(1)(a) which reads as follows:

13-(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner
 and is free from defects in material,

The Tribunal finds that the home was not constructed in

a workmanlike manner because the builder failed to construct it in the way undertaken in the floor plans produced. Building a mirror image of what was undertaken constitutes improper workmanship which is warrantable under the Act.

Having decided that the claim of the Applicants falls within the Act, the Tribunal must decide whether they have established their right to damages.

It must be borne in mind that the Tribunal is only empowered to grant those heads of damages specifically set out in the Act. These are outlined in the section entitled Limits of Liability in the Regulations of the Act. The relevant section is section 6(3) and section (6) which read as follows:

6-

.....
 (3) The maximum amount payable to an owner in respect of warranty coverage under the Act or regulations shall not exceed \$50,000.

.....
 (6) Liability under subsection (3) or (4) is limited to damage to the home only...

The Applicants, therefore, are only entitled to damages to the home. These would not include damages such as loss of enjoyment. The latter damages could be sought by the Applicants in other fora where courts are empowered to grant them; however, such damages are not allowable under the Act.

Under the Act, the Applicants are only entitled to the financial loss resulting from the builder's breach. Unfortunately, the Applicants have not established any such loss. They have admitted that they paid no more for their home than bargained for, that the value of the home was not diminished in the sense that they received all the rooms and all the floor space promised. They led no credible evidence that showed that the home was worth less as a result of the mirror image or that it would be sold for less on resale as a result thereof. Both their testimony outlined their damages as being solely the loss of enjoyment of their home.

Under the circumstances, the Applicants have failed to establish that they suffered damages to their home. For this reason, the Tribunal must reject their appeal.

Accordingly by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow the claim.

SOTIRIOS GARAVELLOS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:
SOTIRIOS GARAVELLOS, appearing on his own behalf
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 4 August 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a letter from the Program to the Applicant dated October 19, 1992 and also from a second decision of the Program in a letter dated July 28, 1993, in both of which the Program denied the Applicant's claim for major structural defects. The evidence indicates that the Applicant bought a new home from a vendor/builder Hazelbriar Homes Inc. at 3420 Dovetail Mews in Mississauga. We do not have a copy of the Offer of Purchase and Sale or the date of the purchase, but it was established that the date of possession was September 30, 1988 and the warranties provided by the Ontario New Home Warranties Plan Act began running from that date. The first notice in writing of the claim given to the Program was received on July 17, 1992 so that if the Applicant is to succeed, he must bring his claims within Section 14(1)(c) of the Act:

14.(1) Where,

-
- (c) the owner suffers damage because of a major structural defect as defined by the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

At the opening of the hearing, counsel for the Program advised that subsequently the Applicant had complained of an additional crack in a basement wall after the first claim had been made and rejected. This claim also was rejected. She said that the Program was prepared to deal with the second claim at this hearing in order to save time and expense. The Applicant also agreed that the Tribunal should deal with all of the claims and the hearing proceeded on that basis.

As aforementioned, the first evidence of the defects in question is contained in the Proof of Claim found at tab 1 of Exhibit 3. In the section for a description of the nature of the problem, the Applicant noted, "See note and diagram attached". On this diagram which is dated July 15, 1992, he stated:

I have recently discovered two cracks on the exterior wall of my home which is all brick. Crack "A" runs from the foundation wall where it is at its widest, to 7 layers of brick where it tapers.

Crack "B" runs the entire height of the structure and only the mortar is affected, again it is widest at the bottom and tapers to the top.

The sheet contains two sketches which show the location and extent of these cracks. Exhibit 6 is a photograph of the first of these ("Crack "A") and shows a pocketknife, later described by Mr. Bruce Stephens, in place. Exhibits 5A, B, C and D are photographs of the stacked joint crack running the full length of the corner of the building where it occurs.

In giving his evidence, the Applicant said that the first crack was up from the foundation wall through five rows of bricks. He described the crack in the stacked joint as running the complete length of the corner of the house as shown in the photograph. The additional claim put forward, as indicated above, was described by the Applicant as a crack in the foundation wall on the west side, a foot or two away from the front of the house and between 1 and 2' in length running down from the top of the wall. Exhibit 10A is a photograph of this crack from the outside with the same pocketknife inserted in it. Exhibits 10B and 10D show the appearance of this crack from both the outside and the inside.

Mr. Bruce Stephens, the representative of the Program who dealt with this claim, said that he made an inspection of the house on October 19, 1992 in response to the filing of the Proof of Claim. He described the first crack in the brick veneer as being a hairline crack running up through six courses of brick. It was he who put the blade of his pocketknife in its widest place. He said that he believed the crack resulted from thermal expansion of the brickwork and in his opinion did not result from any defect in either workmanship or materials.

He described the crack in the stacked mortar joint which ran the full length of the corner as being about 1 1/16" wide on October 19, 1992, and he said that when he was back looking at the building on July 28, 1993, this crack had been caulked by the builder. On the second inspection, Mr. Garavellos showed Mr. Stephens the crack in the basement wall (the first occasion when it was brought to the attention of the Program) and he took the photographs of it above mentioned. On July 28, 1993, a second decision letter was issued to Mr. Garavellos (Exhibit 8) stating that the defects addressed by Mr. Stephens did not constitute major structural defects.

In concluding his evidence, Mr. Stephens said that in his opinion the crack up the stacked joint and the crack in the basement wall were expansion cracks and he said that in his opinion, neither of them would have qualified as warrantable defects if reported within the first year after possession. In this case, not only were they not so reported within the first year but we have no evidence that any of the three cracks were in existence within the first year and, in any event, we do not have to determine whether if they had been reported within the first year we would have found them to be warrantable defects.

As stated at the outset, Mr. Garavellos can only succeed here if he can establish major structural defects. The Tribunal must find, on the evidence we have here, that he has not done so. The term is defined in clause (o) of Section 1 of Regulation 726 made under the Ontario New Home Warranties Plan Act:

- (o) "major structural defect", means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,
 - (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
 - (ii) that materially and adversely and adversely affects the use of such

building for the purpose for which
it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

None of these defects result in failure of any load-bearing portion of the building or adversely affects any load-bearing function; none of them either materially or adversely affect the use of the building for the purpose for which it was intended and the crack in the basement wall is not "a major crack" within the definition.

Therefore, by reason of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal hereby directs the Ontario New Home Warranty Program to disallow this claim.

DR. AND MRS. SEAN GIBSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
JACINTH HERBERT, Vice-Chair as Member
EDWARD WEISZ, Member

APPEARANCES:

ROBERT G. ZOCHODNE, representing the Applicant

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF 25 March 1993

HEARING: 12 May 1993

Toronto

REASONS FOR DECISION AND ORDER

This was a claim by Dr. and Mrs. Gibson against the Program under Section 14(1)(a) for financial loss because of the vendor's failure to complete the construction and a claim under Section 14(1)(b) for breach of warranty in respect to the work done by the builder. The evidence before the Tribunal indicated that Dr. and Mrs. Gibson purchased the lot and then sought out a builder. The builder they chose was Dovetail Construction owned and operated by Chris Mace.

The Gibsons agreed with Mr. Mace for him to construct a custom home on their lot at a price of \$500,000 and a further \$100,000 to be paid in cash. The evidence of Mrs. Gibson was to the effect that she thought they would get a better deal this way and realized that Mace was endeavouring to deceive Revenue Canada as to the actual contract price. Mrs. Gibson testified the work started in October 1989 and proceeded until March 1990 when Mace was discharged from the job. The evidence clearly indicated that Mrs. Gibson presided over the construction on a daily basis. The evidence also indicated that a number of the contracts were going to be done through trades directed by the Gibsons, particularly Mrs. Gibson. These consisted of the electrical work, the hardwood flooring, the kitchen cabinets and probably the carpeting.

In addition, the evidence of both Dr. and Mrs. Gibson indicated that they were not happy with Mace's ability to handle the lighting and heating contracts, and this resulted in Dr.

Gibson's case particularly of getting quite involved in the sophisticated heating and lighting systems which he wanted installed in this house. A number of contracts were also entered into directly between the Gibsons and other contractors. This included Global Railings, the insulating contractor and the heating contractor. Mrs. Gibson testified that the Gibsons supplied the drawings, took out the Building Permit and conceded that she was on the site on a daily basis during construction. She also testified that the kitchen cabinets had been selected and ordered three years previously and that the carpets had also been selected. At some time during the process of the construction, Mr. Mace indicated to Dr. Gibson that he had a problem with a previous project and Dr. Gibson on the recommendation of his lawyer made a loan of \$50,000 to Mr. Mace and received a further \$25,000 reduction in the contract. Dr. Gibson in his evidence also testified that he had a "gut feeling" just prior to entering into the agreement that Mace was out of his league. Yet the Gibsons went ahead with the transaction including these very suspect cash payments. Apparently in late February or early March, Dr. Gibson was contacted by Revenue Canada about not making payments to Mace. Mace assured Dr. Gibson that the matter was being resolved, but in any event in March 1990 while Mace was on vacation, it became apparent that trades were not being paid and that there was considerable confusion as to what monies had been disbursed. As a result, the Gibsons hired Mario Stratti who had been Mace's supervising foreman on the job to complete the project. On Mace's return from vacation, he ascertained that all his files dealing with the project had been removed by Mario Stratti and when he met with the Gibsons, he was either terminated or they mutually agreed that he could not complete the construction.

Although the contract provided that the home would be enrolled under the Ontario New Home Warranties Plan Act, there is no indication that the Gibsons sought to confirm such registration and in fact on the evidence of Mr. Mace his registration as a builder had lapsed for approximately a year and a half prior to the commencement of construction on this project. From Mace's evidence and from the claim submitted by the Gibsons against the Program, it would appear that what was being contracted was a home of close to one million dollars and in the view of this Tribunal, the Gibsons should have been very sceptical of dealing with someone such as Mace who was prepared to do work on an under the table basis. It would also in the view of this Tribunal indicate that

Mace was not being engaged to be a "builder" as defined under the Act being "a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home...". In the view of this Tribunal, Mace was being engaged to perform some of the construction work and Mrs. Gibson was very much

involved in supervising, to the extent that she was capable, the construction.

Moreover, before making a claim against the Program the Gibsons had the roof pitch raised and the roof resingled. All of these acts, in the view of this Tribunal, indicate that the Gibsons were not looking to protection under the Ontario New Home Warranties Plan Act, but were in fact directly involved in the construction of their home. It was only when things went awry and then and not until sometime later that the Gibsons decided to claim against the Program.

In the view of this Tribunal, the Gibsons are not covered under the warranty provisions of the Act as they are not "owners" contracting with a "vendor".

By virtue of the authority vested in this Tribunal, the Tribunal hereby directs the Ontario New Home Warranty Program to disallow the claim of the Gibsons.

GRIMESWAY CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
JACINTH HERBERT, Vice-Chairman as Member
EDWARD WEISZ, Member

APPEARANCES:

J. WILLIAM EVANS, representing the Applicant

NETANUS RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF 8 September 1992

HEARING: 24 November 1992

Toronto

MAJORITY DECISION

On May 15, 1991, the Ontario New Home Warranty Program gave notice by registered mail of its Proposal to revoke the registration of the appellant company Grimesway Construction Ltd. (hereinafter referred to as "the builder") on the following grounds:

1. You have a record of breaches of warranties within the meaning of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, (the "Act"), TO WIT:
 - (a) You have failed to acknowledge or comply with conciliation report(s) rendered by the Warranty Program dated October 30, 1990 in respect of premises owned by Mr. and Mrs. Perdue located at 15 Needham Street, Lindsay, pursuant to an agreement of purchase and sale between these owners and Grimesway Construction Ltd.
 - (b) Specifically, you have failed to comply with item(s) found to be warranted by the Warranty Program in respect of the aforementioned

premises and reflected in the
aforementioned conciliation
report(s).

- (c) You have failed to respond to letter(s) concerning the aforementioned report(s) related to the homes in which the Warranty Program advised that the provisions of the conciliation report(s) be completed with by you and which were not so complied with.

2. In the alternative and pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, (the "Act"), you have committed breaches of terms and conditions of registration, TO WIT:

- (a) In failing to comply with conciliation report(s) and the request(s) of the Warranty Program to so comply you have contravened subsection 3 of Regulation 728 in that as a registrant you have failed to diligently perform or cause to be performed all obligations imposed on you under the Plan and under any agreement being the Vendor/Builder Agreement signed by you on May 1, 1987 made by you with the corporation in respect of the Plan.
- (b) You have failed to comply with subsection 4 of Regulation 728 in that as a registrant you have failed to indemnify and save harmless the corporation under the Vendor/Builder Agreement from any loss which was itemized and sent to you in respect of invoice number(s) 15936 in the amount of \$6,152.50, which monies are owed by you in accordance with the provisions of the Vendor/Builder Agreement to which reference has been made.

In issue essentially is the sum of \$6,152.50 paid by the Program in settlement of the homeowner's claim and which it seeks to recover from the builder.

The subject home was built by the appellant for one Perdue not however to his complete satisfaction but possession was taken on April 30, 1989. On October 30, 1989, Perdue wrote to the builder enclosing the following list of deficiencies:

1. Water is leaking through the siding under the front window, possibly damaging the carpet, insulation and possibly more severe damage;
2. The siding on the west side of the house has huge unsightly bulges in it;
3. The ceiling in the kitchen is warped out of shape close to one inch in a two foot length indicating that the drywall is possibly unattached from the ceiling studs;
4. The vapour barrier in the basement is unfinished and the workmanship is poor;
5. The parging is falling off around the house. The tar line is also uneven and should be covered;
6. The kitchen cupboards are not working satisfactorily;
7. The sump pump line is improperly drained.

A copy of this correspondence was received by the Program on January 18, 1990. In March, Perdue again wrote to the Program to the effect that no action had been taken by the builder to address his complaints and on April 17, the Program referred the list to the builder. It appears the builder continued to ignore Perdue's complaints and as a result, he requested a conciliation meeting which took place at the home on October 11, 1990.

Brian Martindale, inspector for the Program set out in his report the following observations and mailed them to the builder on October 30, 1990:

1. COMPLAINT Uneven ceilings in:
 - a) Kitchen
 - b) Bathroom
 - c) Living Room

OBSERVATION: The ceilings in the kitchen, bathroom and living room are excessively out of level displaying said conditions at:

- a) Kitchen - north and south side of entrance from hall.
- b) Bathroom - over entrance door.
- c) Living Room - at east/entrance common wall at south end as well as above 90 degree corner of entrance/hall wall opposite to the south (just across from entrance to the kitchen).

2. COMPLAINT Leak under living room window.

OBSERVATION: Vinyl siding was repaired under the living room window re water leakage. The carpet was wet beneath the window at the inspection indicating that the source of the leak was not addressed. Caulking around the window at the lower east corner as well as at the lower aluminum 90 degree trim joint on the sill was inadequate.

3. COMPLAINT Caulking to be completed.

OBSERVATION: Caulking is required on the east wall at the hydro electric service entry point.

4. COMPLAINT Hole to be repaired in drywall.

OBSERVATION: In the master bedroom on the southwest inside 90 degree drywall corner, a lumpy taping installation exists at approximately the 5 ft. elevation area.

5. COMPLAINT Parging not low enough and uneven.

OBSERVATION: On the east and west basement walls under the basement windows [2] [one on each wall], it was observed the building paper originally installed between the aspenite and siding had been removed by said contractor and not replaced. The siding is to be removed again and proper building paper re-installed prior to re-installation of the siding.

6. COMPLAINT No downpipe at front entrance.

OBSERVATION: No downpipe/run-off extension pipe exists at the eavestrough outlet above the west side of the front entrance.

It is to be noted that the Warranty Program's correspondence to the builder contained the following paragraphs:

Enclosed is a copy of the conciliation report on the above property. Please be advised that THIS IS YOUR ONLY NOTICE to substantially complete the work as listed on Schedule A(1) within thirty (30) days of receipt of this letter...

Should you fail to proceed with and complete the work as detailed in Schedule A(1) in the above time frame, you will be considered to be in breach of your warranty, and the Warranty Program will resolve the outstanding warranted items either by cash settlement or by undertaking the work. You will be invoiced for our full cost including an administrative fee.

Grimes, the builder through his solicitor replied on November 19 and it appeared the matter could be settled on a cash basis. Mr. Evans, solicitor for Grimes, wrote as follows:

I confirm my telephone conversation with you recently in this matter. I further confirm my office attendance on Mr. Grimes to discuss same.

Mr. Grimes has advised that he is interested in a dollar settlement rather than in attending at the property to complete any further work. In this regard, we would require a full and final release signed by both Perdues, releasing my clients from past and future claims in connection with this property.

My client is also asking that you act as Mediator in this matter as Mr. Perdue will not deal directly with Mr. Grimes.

Please advise.

Yours truly,
J. William Evans

The Program's reply directed to Mr. Grimes seems to ignore Mr. Evan's correspondence since it dealt with the builder completing the work and gave him until December 14 to do so. Grimes did not return to the premise expecting the matter to be settled on a cash basis, and as a result the Program obtained estimates (Exhibit 4, tab 14 and 15) for \$6,539 from Heritage Home Building and \$5,761.25 from one Robert Fawcett. A cash settlement was then effected with Perdue for \$5,000 and the Program subsequently invoiced Grimes for the \$5,000 together with the sum of \$750 administration charge and \$402.50 GST which now becomes the subject of its claim.

Brian Martindale, the Program's inspector in his evidence pointed out that there was a certain bitterness between Grimes and Perdue which almost precluded the builder's return to complete the repairs. Grimes, he said, felt a cash settlement would be in the interests of both parties. Continuing in evidence, he said that Grimes had no disagreement with what he had warranted and had no dispute with him. He added, however, that after receiving Mr. Evan's letter of November 19, he intended to leave the settlement to the parties themselves, but after advising Evan's office that the builder had until December 14 to finish the work and after being advised by Grimes there was no communication between him and Perdue, he decided to issue his report. He said he told Grimes he had to begin negotiations to settle immediately.

Patrick Grimes giving evidence was critical of the work which had been estimated at over \$5,000 since he considered it unnecessary. He said the whole house cost only \$2,500 to drywall so why should he spend \$5,000 to repair the ceilings. He pointed out that he builds five to ten homes per year. This house he said had a truss roof and minor adjustments could have been made without removing the ceiling. He emphasized that the cost could have been cut 90% had the repairs been done his way. He suggested that the floor could have been raised by jacking up the bearing wall and inserting shims in the studs. The Program's tolerance was 3/8" so he would have to go up only 3/8" to meet them halfway. It was his opinion that the wall sank a little in the Spring when the house settled which caused the ceiling to be out of true.

Called in reply, Mr. Martindale said that Grimes' method of repair was based on an opinion that the footings had settled. He disagreed pointing out that if that had occurred, the floor itself would have been twisted. The floors, however, were level. The estimates he received were, he said, for a good ceiling not one that would only meet the acceptable standards.

In argument, Ms. Rutherford for the Program contends that even if Mr. Grimes' method would be feasible, it would still not result in an even ceiling. He intended to bring up the ceiling

3/8", but the evidence of Mr. Martindale was that the ceilings were out in some places as much as 1". To jack it up 3/8" would still leave 6/8" out in some areas.

This is an unfortunate affair and one cannot but feel some compassion for Mr. Grimes. There is ample evidence of the animosity between him and Perdue which dictated a cash settlement as the only sensible and logical resolution of the matter, but Grimes is to a great degree the author of his own misfortune in that he left the issue to be concluded by the Program with little or no communication on the manner of repair. Quite apart from his obligations under the Statute, he is bound under his Vendor/Builder Agreement which says in part, "As builder he covenants with the Corporation to diligently perform such work and to indemnify and save harmless the Corporation and its insurers from any loss which they or any of them may suffer owing to his failure to do so."

The Company is in default on this covenant. Consequently, we find it has failed to comply with subsection (4) of Regulation 728 in having failed to indemnify the Corporation in the sum of \$6,152.50 arising from the Corporation's settlement with the homeowner.

The Registrar is therefore directed to carry out his Proposal if after 15 days of the release of this Order the appellant continues to be in breach of Regulation 728, subsection (4).

DISSENTING DECISION

of Edward Weisz, Member

I have read the judgement of the Vice-Chairman herein and I am not able to agree with his conclusion.

The crux of this case lies in what was the actual responsibility of the Program to the homeowners. If the Program paid more to the homeowners then they were legally liable to do, it cannot recover this extra from the builder.

The warrantable defects in the house were defects resulting from the fact that the centre bearing partition in the basement was framed on a footing that was not sufficiently protected from frost during construction and had been raised by frost. The bearing partition had been put in place while the footing was thus raised, therefore when the frost went out it fell a short distance - perhaps up to but not more than 1". The result of this settlement of the bearing partition was that drywall was pulled away from the ceilings in the kitchen, bathroom, and living rooms at this bearing wall. As indicated in the evidence on behalf

of the builder, the proper method of repair was to raise the partition back to its original position, support it properly in that position and repair the remaining rather minor drywall and other damage that would exist. I agree with this method of repair and I also concur with the builder's estimate of the cost thereof being between \$1,200 and \$1,500. The sum of \$1,500 should certainly have been ample to cover all of the necessary repairs here.

The Program's payment was based on two estimates of the cost of other methods of repair. In any event, the evidence was that, following the making of the cash settlement, no remedial work has been done to put the frame back square. It appears clear that the Program paid \$3,500 more to the owners than it was required to do to remedy the warrantable defects properly and it should not have a claim upon the builder for this extra money.

I feel that the Program failed the builder in this case by not communicating with him the amount of the cash settlement which it was considering before making the deal with the owners. The Program knew that there was a difficult relationship between the builder and the owners, it knew that the builder was not trying to escape its proper responsibility, and it knew that, in these circumstances, the builder was relying on the Program to mediate the issue between the parties. Nevertheless, the Program went ahead and made this settlement unilaterally. If the Program had let the builder know of its intentions, this whole dispute would not have come to this. The builder would probably have made arrangements with a third party contractor acceptable to both sides to have made the proper repairs at a reasonable and acceptable cost. In the circumstances of this case, the Program had certain responsibilities to the builder as well as to the owners and it failed to meet these fairly.

Therefore, the order which should be made herein is that the Applicant should pay to the Program \$1,500 plus the 15% thereof plus the applicable GST.

RIAZ HAIDER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

RIAZ HAIDER, appearing on his own behalf

RICHARD CARTY, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 6 August 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a decision letter to the Applicant dated March 18, 1993. Pursuant to an Agreement of Purchase and Sale the Applicant bought a new home from a vendor/builder Paradise Homes (Yellowfile) Inc. at 7330 Aspen Avenue in Mississauga. The transaction closed as scheduled on June 28, 1991 and the warranties specified in the Act began to run from that date. The Applicant had a number of complaints as to defects, but all of these have been resolved except one which is the subject matter of this appeal and which concerns the brickwork on his home and the continual appearance of efflorescence upon it from the beginning up to the present time.

The Applicant made this claim upon the Program within the time limited by Section 13(4) of the Ontario New Home Warranties Plan Act by setting it out as the second item in a letter to the Program of January 23, 1992 in the following terms:

2. The house bricks have white patches of probably lime or some other substance all over their surface. Apparently the bricks are of sub-standard quality. At possession time the builder's foreman told us that these brick stains would be washed out by rain over a couple of months. However, this has not been the case. It

is now over 6 months and white patches have stayed the same.

In his evidence, the Applicant said that there was an inspection of the house at the time of closing at which he was present and he observed a problem with the brick "white crust, white patches and spots on the bricks." He said it was to be found in many areas over all four of the walls. He asked the builder's representative at the inspection about this and the latter said it was not of consequence and would disappear with the next rainfall. While the rain would take it off, more would continue to reappear afterwards. Mr. Haider complained to the builder who did not correct the situation and so he wrote to the Program on January 23, 1992 as indicated above.

The Program arranged a conciliation meeting at the home on April 6, 1992. While certain other complaints were found to be warrantable, this one was not. In a Schedule A(2) attached to the report, the following is stated:

Complaint:

The house bricks have white patches of probably lime or some other substance all over their surface.

Observation:

On the exterior of the brick, especially under the concrete window sills, there were areas where there was efflorescence on the surface of the brick.

Comments:

This efflorescence is more noticeable in some calcite bricks rather than others. An investigation of two other lots in the subdivision with the same brick revealed efflorescence on the surface but to lesser degrees.

Mr. Haider requested further clarification of its position on this complaint from the Program and this clarification was provided in the second last paragraph in a letter of May 25, 1992 from Mr. Fortune of the Program which reads:

It seems that your major concern is that the Program is allowing the builder to monitor the brick problem for too long a period of time. The Program is willing to revisit your home in the fall of the year to review the brick. If in the opinion of

the Program the efflorescence is stable then a cleaning would be done. If the problem still exists then an independent person may be employed to assess the situation.

Mr. Haider replied to this by letter on May 28, 1992 to the Manager of the Brampton office of the Program in which he said:

As you may be already aware the above matter has been under the consideration of the Warranty Program for the last 3 months and to date no action has taken place to address the problem. I find this position as being not very satisfactory. Apparently the seriousness of the efflorescence problem is not being recognized. It is both intensive and extensive in magnitude and has existed for the past one year. Over the period the bricks have been decayed both in colour and composition. I am not sure how this condition can be repaired through cleaning in fall as proposed by Mr. Fortune. It would be appreciated that one year time is long enough for wait and see, and now is the time for action. I have tried to convince Mr. Fortune that there should be no more waiting and the solution lies in ordering the replacement of bricks. Apparently it has been of no avail.

In view of the above stale-mate I have been advised by Mr. Fortune to approach you for a decision in the matter. However, I believe that your good office can help bring a satisfactory resolution of the problem. I am prepared to wait until fall if it is agreed in principle now that should efflorescence and decay in bricks are not cured by then their replacement would be ordered by the Warranty Program. Alternatively, the cleaning can be done now and the situation is observed over the period until fall. Should it not prove to be satisfactory then the bricks have to be replaced.

On July 2, 1992, the Program arranged a meeting at the premises of a representative of the builder and a technical representative of Canada Building Materials, the manufacturer of the brick. This meeting took place on July 9 and Mr. Masucci, the technical representative wrote a letter to the Program in which was stated:

Occasionally, the question arises about the appearance of a white deposit on the face of the wall. This is known as efflorescence. Efflorescence is usually associated with water entry into the unit and can appear on walls built of calcite, clay brick, natural stone and concrete block. It is a deposit of soluble salt, usually white in colour, and can originate from any of the components of the masonry assembled. These salts are carried to the face of the wall by means of evaporation. Efflorescence is not harmful to the performance or durability of the wall.

The treatment of efflorescence is relatively easy. Most efflorescing salts are water soluble and will disappear with normal weathering. The disappearance can be accelerated by dry brushing, followed by a flushing with clean water and soap. We recommend this cleaning process should not be undertaken until the Spring of 1993.

The Program sent a copy of this letter to the Applicant on July 14, 1992 with a letter setting out its position at that time:

Enclosed please find a copy of a letter from Nino Masucci of CBM, who essentially concurs with what we have tried to explain to you in the past that efflorescence problems you are experiencing are not uncommon or unusual and that normal weathering will resolve this situation in due time. However, since we offered to wash your brick in the fall of 1992 we will do so, although we would agree with Mr. Masucci that the spring of 1993 would be better.

Once this cleaning has been done we would respectfully request that you monitor the condition of the brick for a reasonable period of time to appreciate the results and to contact this office should the problem persist. If necessary, further research would be carried out at that time to locate the source.

The Warranty Program is not prepared to commit itself to the replacement of the bricks unless it is proven that the material is defective to the point of not being suitable for the purpose for which it is intended.

The builder then arranged to have a professional expert inspect the problem and make a report. Mr. Garth Miller is a graduate architect from the University of Manitoba in 1950, a member of the Royal Association of Architects and has worked on masonry problems, published papers and given seminars for many years and is currently the Director of Promotion with the Ontario Chapter of the Canadian Masonry Contractors Association. His report of September 24, 1992 is found at tab 24 of Exhibit 5 and he was called as a witness by the Program. Upon his qualifications, the Tribunal found him to be an expert witness. In his report of September 24, 1992, he stated:

At your request through Canada Building Materials Company, I visited the above named residence with you on September 23, 1992. We viewed the areas of concerns relating to the appearance of efflorescence on all four elevations. The fact that all four walls showed indication of efflorescence indicated that the masonry walls were still in the process of drying out from the construction process.

It is my opinion that it will be quite some time before the walls will eventually dry out.

In the meantime, the efflorescence that is appearing may be brushed off or the next rain usually washes away the salts.

Efflorescence is only a visual concern with no damaging effect structurally to the wall. Efflorescence will only appear

when there is excess moisture within the wall and where there are salts in the wall. During the drying weathering cycle, the moisture with the salts in solution are drawn to the wall face where the salts remain as the moisture evaporates.

In his evidence, Mr. Miller explained that efflorescence is the result of excess moisture taking salt out of the bricks to the surface and there, when the moisture dries up, the residue of salt is left forming the efflorescence. The fact that there is some salt in bricks is not evidence of any defect in the workmanship or materials which went into their manufacture as all or almost all bricks will have some salt. The moisture in the wall which has to dry up, and in the process, bring out the salt may be there when a wall is originally built or may get in later. It was Mr. Miller's evidence that the length of time over which the problem kept appearing in this case indicated to him that moisture was getting into these walls after their original construction as the probability is that moisture present at the original time of construction should have been all dried up by this time. He said that normally it is expected that moisture in a brick wall at the time of construction will dry out in a maximum of two years and these walls were completed in April of 1991.

It was also his opinion that the source of this subsequent intake of moisture was not from rainwater because, in such case the result would not show up, as it does here, all over all four walls of the house, consistently over the whole period. For water to penetrate during a storm, it will do so much more from rain driving against the wall and this, of course, will be effected on the side facing the storm and not on other sides.

This evidence indicated to Mr. Miller that the more probable continuing source of the moisture was humidity from inside the house. This source would be consistent with the efflorescence appearing, as it has done, all over all four walls. Further in support of this inference was the evidence of Mr. Baruch, Construction Manager of the builder, and of Mr. Thoburn, an officer of the Program, both of whom described a high state of humidity in the house when they were there. Mr. Baruch described seeing the water pipes in the basement covered with condensation. He also said it was very warm in the house. Mr. Thoburn also saw considerable condensation throughout the house. He said that there was more efflorescence on the walls higher up than lower down and this is consistent with the fact that warm moist air will rise.

All three witnesses for the Program were emphatic that these brick walls exhibited no defects in workmanship or materials and no breach of the Ontario Building Code. It was Mr. Miller's

evidence that efflorescence is not evidence of any defect in materials or workmanship or of any breach of the Code and he saw no defect in either materials or workmanship during his examination of these walls. He said it was quality brick. He also said that rebricking the walls as requested by the Applicant would not help with the problem.

Mr. Baruch said that his supervisor who was responsible for this brickwork was a capable and experienced man, that they built over 100 homes in this subdivision in five months, all in good weather and that he has looked at these walls in question carefully on a number of occasions and is satisfied that there are no defects in materials or workmanship. He said the efflorescence has continued, sometimes worse than other times but, while still noticeable, it is not as pronounced as it once was. It was his suggestion that Mr. Haider get a dehumidifier and an air conditioner to circulate the air and render it less humid. Mr. Thoburn also said that he saw no defects in material or workmanship from his inspection of these walls.

Upon all of this evidence, the Tribunal must find that the Applicant cannot succeed with this claim. To do so, he must first establish a breach of one of the warranties provided in Section 13(1)(a) of the Act:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

While the Applicant said that the bricks were defective, he provided the Tribunal with no expert evidence and no tests made to substantiate this opinion. On the other side, we have the evidence of one professional expert witness, two other witnesses who are experienced in the construction business - all of whom examined this brick and said that it exhibited no evidence of defects in workmanship or material. There was no evidence from any source suggesting a breach of the Ontario Building Code. Also while the Applicant did establish the continuing presence of efflorescence, the most probable cause of this is continuing high humidity in the house. There is no evidence upon which a finding can be made of a cause for which the Program is responsible.

Furthermore, the Applicant did not provide the Tribunal with any evidence upon which an assessment of damages flowing from the existence of this efflorescence could be made and the onus for proving damages in such circumstances is upon the Applicant.

Furthermore, even if the Applicant were found to have established defective workmanship or materials in the manufacture of these bricks, he could not succeed because he did not prove any damages. (see the case of Dan Vera (1988) 17 CRAT 185)

Therefore, pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

The above decision was appealed to the Divisional Court. Its decision is reported at 27 C.R.A.T. 1040.

MARIA HUMPHREYS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
GERRY BEECH, Member
HANS G. KEPPLER, Member

APPEARANCES:

MARIA HUMPHREYS, appearing on her own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 26 November 1992 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision set out in a decision letter from the Ontario New Home Warranty Program to the Applicant on June 24, 1991. The Applicant was a second purchaser of the home in question here which is at 5572 Millbrook Lane in Mississauga, Ontario. The Applicant bought the house in March of 1988 from a neighbour who, we were given to understand, had purchased two adjoining houses from the builder.

We did not have any particularly satisfactory evidence of the actual date of possession of the first purchaser to fix the date from which the various limitation periods provided in the Ontario New Home Warranty Plan Act and the Regulations for the notification of the Program of claims for defects should have commenced to run. What we have here is a statement by counsel for the Program at the opening of the hearing that this date was June 30, 1987 and no evidence whatever during the hearing on this point. Since the onus is on the Applicant to prove every essential element of her case, there is no way that we can find here any later date than June 30, 1987 for this purpose and the Tribunal will deal with the Applicant's claims on this basis.

The claims put forward at this hearing by the Applicant are two or perhaps three in number. The Applicant and her husband moved into the house in May of 1988. The first of the complaints of which we are concerned here is a crack in the north foundation wall which let water leak into the basement in March of 1989. This was a crack near the middle of the south wall running from the floor all the way up to where the brickwork began at the top of the

foundation wall. On March 29, 1989, the Applicant wrote to the builder about this defect and sent a copy of this letter to the Program on the same day. As a result, the builder arranged to have someone attend on May 5 and make repairs to the inside of this wall filling in the crack and fixing it so that, in fact, it has never leaked again and the Applicant has no further complaint about either its leaking or the repairs made on the inside. However, the Applicant says that the repairmen told her that some different repairs should also be made to the crack on the outside of the wall and that someone would come later to do this. No one has ever come to do this and the Applicant furnished the Tribunal with two photographs which show this crack clearly visible on the outside at the present time. The evidence establishes that this is a poured concrete foundation wall.

The only other evidence we have of assistance in dealing with this claim is expert testimony from Mr. Tibor Pal, an engineer employed by the Program as a consultant to attend and inspect the alleged defect and give to the Program a professional opinion upon which to base a decision. Mr. Pal gave the Program a written report dated January 27, 1992 in which he dealt with this item in the following terms:

In the north wall a 1/64" vertical crack was repaired by epoxy injection. Water leakage is not occurring at the cracks.

The cracks are the result of normal shrinkage of the concrete.

And he goes on to state that,

It is my opinion that the construction of the noted items meet the requirements of the applicable O.B.C.(1986).

In his oral testimony before us, Mr. Pal characterized this as a normal shrinkage crack and said that it does not constitute a major structural defect within the meaning of the Act and the Regulations. He said that a settlement crack would widen as it went up and this one clearly does not do that.

Upon all of this evidence, the Tribunal must find that the Applicant cannot succeed with this claim. The report of the claim to the Program on March 29, 1989 was over one year after the time was limited and began to run on June 30, 1987 so that to succeed it must be found to be either a major structural defect to come within section 14(1)(c) of the Act or be a claim as to water penetration through a basement or foundation wall to come within section 18 of Regulation 726.

Upon the evidence of Mr. Pal, which was uncontradicted, we must find that this is not a major structural defect. While the evidence shows that the defect did allow water penetration within the meaning of section 18 of the Regulation aforementioned, the evidence also establishes that the repairs made by the builder in May of 1989 effectively remedied this problem. The repairs being sought to the outside of the crack are clearly of an aesthetic nature and, if this defect could be shown to come within the provisions of section 13(1) of the Act, the complaint would have had to have been made within the year provided.

The next complaint or concern was a crack in the foundation wall on the south side of the house and a line of cracking in the brick veneer on the south wall of the house starting approximately above the crack in the basement wall and running up to a window and then approximately from above the same point on up at least to the second floor and then perhaps on up almost up to the top. The evidence is not clear as to exactly how high this crack goes but, in the result, this is not of consequence. The first time that either the Applicant or her husband noticed any of these cracks was on April 21, 1991. On that date, the Applicant wrote to the builder advising of these cracks in both the foundation wall and the brickwork on the south side of the house and sent a copy with a covering letter to the Program.

At this hearing, the Applicant produced photographs of both the foundation wall and of the brickwork as they appear today which show the cracks of which she was speaking. The crack in the basement wall is clearly visible and is about vertical running all the way from top to bottom. The cracks in the bricks are also visible and also run almost vertical alternatively between bricks and through the middle of bricks as the crack proceeds up through one course of bricks after another. As with the other cracks discussed above, the Applicant produced no expert or professional testimony concerning these defects.

On the other hand, the Program called the evidence of Mr. Pal concerning these. In the written report, he dealt with these cracks in the words:

There is one close to vertical crack in the south wall starting at the west bottom corner of the window and extending to the basement floor. This crack is 1/16" wide. I understand that the crack has been sealed by waterproofing on the outside...Water leakage is not occurring at the cracks.

The cracks are the result of normal shrinkage of the concrete.

Mr. Pal deals with the cracking in the brickwork on the south wall in the following language:

The crack starts at the top west corner of the basement window, in line with the crack in the foundation wall, and progresses to the main floor and second floor windows. This wall is approximately 35' long. The crack in the concrete brick veneer is the result of shrinkage and thermal movements.

The words

It is my opinion that the construction of the noted items meet the requirements of the applicable O.B.C. (1986)

also apply to these items.

In his oral testimony, Mr. Pal said that in his opinion, none of these cracks constituted a major structural defect. He made the same comment that a settlement crack would have widened as it proceeded upwards and these did not. He said that the brick veneer was in no danger as a result of any of the cracking which he saw.

As with the crack in the north wall, the Tribunal must find that the Applicant cannot succeed with these claims. On the evidence, we must find that they do not constitute a major structural defect. Nor does the basement crack lead to any water penetration (reporting it on April 21, 1991 in any event was outside the two year limitation for such a claim); the same reasoning as set out above renders this claim not allowable under section 13(1) of the Act.

Therefore pursuant to the authority vested in it by virtue of section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claims herein.

GARY KEITH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
JACINTH HERBERT, Vice-Chair as Member

APPEARANCES:

GARY KEITH, appearing on his own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 22 March 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Gary Keith from the decision of the Ontario New Home Warranty Program disallowing his claim for repair to a wall which had been constructed on the east side of his house for the erection of a car port.

The facts are not in dispute and may be stated briefly. Keith entered into a contract to purchase a home in New Liskeard with a builder Rheal Gelinas. A Building Permit was issued to Gelinas on March 30, 1990 for a single family house with no garage. Subsequently, a further Building Permit was issued on June 13, 1990 for an attached carport to be constructed on the east side of the house. For this purpose, the contractor built a wall of poured concrete 12" thick and 30' long between the house and the carport which was intended to support four columns of the carport.

On May 2, 1992, Keith wrote to the Program complaining of structural damage to the wall alleging the break was caused by improper installation. Having taken possession on December 17, 1990, the appellant could not, of course, bring himself within the one year warranty provided by Section 13(1) of the Act and, therefore, his only remedy against the Program lay in finding a major structural defect. On this point, the parties are also in agreement.

In his evidence, Mr. Keith said he wanted a solid wall in order to have it bricked up and providing some privacy. In the Spring of 1991, he observed a hairline crack in the wall but was not concerned about it believing it to be the result of shrinkage.

A year later he found a major crack in that area which is the subject of this appeal.

Keith said he called contractors, but they would do nothing although the Program's inspectors gratuitously offered to provide some method of repair. He then had other contractors give him an appraisal of the cost of repair. One Germain tendered a price of \$15,194 and one MacDuff the sum of \$16,050.

The Program's inspector, a Mr. Blanchard, Technical Representative for the Plan then gave his evidence. He had been handling conciliations for the past five years for the Program and had been appointed to inspect the wall. Mr. Blanchard in his report of July 30, 1992 directed to Mr. Keith said that "It appears that the cause of the crack in the wall is caused by frost action due to the lack of frost cover on the front portion of the carport wall." He continued:

Alex Pederson of Helmer Pederson Const. has agreed to supply the labour to install rigid foam insulation along the foundation to reduce the depth of frost penetration but will not pay for materials. I have yet to contact Rheal Gelinas to have him pay for materials. Should Mr. Gelinas refuse to pay for materials it will be your responsibility to supply materials while Mr. Pederson supplies the labour. Any solution that is different from the above will be your responsibility to solve in a manner that you find suitable.

On his inspection, Blanchard said he found no deflection, no structural defect and no failure of the load-bearing portion of the building. He observed that the frost cover was short on the front of the wall and the installation of foam there would prevent the penetration of frost. The settlement he proposed, however, was not accepted.

It is unfortunate in a matter of this concern to the appellant that he has tendered no evidence beyond his own to assist this Tribunal in a determination of his claim. We have no expert or independent evidence and in light of Mr. Blanchard's testimony are unable to find in the appellant's favour. On the evidence, we find as a fact there is no major structural defect as defined by Section (o) of Regulation 726 of the Ontario New Home Warranties Plan Act and must, therefore, disallow the claim.

GEORGE KOENIGSBERG

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
GERRY BEECH, Member
JOHN HURLBURT, Member

APPEARANCES:
MARTIN GREENGLASS, representing the Applicants

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 26 April, May 10, 1993 Toronto

REASONS FOR DECISION AND ORDER

On August 24, 1986, George Koenigsberg ("Koenigsberg") agreed to purchase condominium unit #301 at 222 The Esplanade in Toronto from Victoria & Lawrence Investments Ltd. The purchase price was \$111,990 to be composed of three deposits, each of \$5,600, \$11,198 to be paid on closing; and with a mortgage of \$83,992 to be assumed.

The transaction was to close on March 10, 1988, but was extended under the allowance of 15 months available to the vendor to July 13, 1989. Koenigsberg also bought a parking space for \$7,000 and an appliance package for \$2,295 plus 7% Provincial Sales Tax of \$160.65 for a total of \$9,455.65. The Agreement of Purchase and Sale was amended on October 1, 1986 to show the purchasers to be "George Koenigsberg and Rochelle Koenigsberg".

On July 13, 1989, the Statement of Interim Occupancy adjustments was therefore as follows:

YORKTOWN ON-THE-PARK

INTERIM OCCUPANCY ADJUSTMENTS

RE: VICTORIA & LAWRENCE Sale to KOENIGSBERG
 Suite 301
 222 The Esplanade, City of Toronto
 Municipality of Metropolitan Toronto

INTERIM CLOSING DATE: July 13, 1989

SALE PRICES

Residential Unit	\$111,990.00
Parking Unit(s)	\$ 7,000.00
Appliance Package	\$ 2,455.65

DEPOSITS PAID

Residential Unit	\$ 16,800.00
Parking Unit(s)	\$ 3,500.00
Appliance Package	\$ 2,455.15

PRINCIPAL BALANCE OF FIRST MORTGAGE TO BE ASSUMED	\$ 83,992.00
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OCCUPANCY FEE \$1,372.99 PER MONTH CREDIT VENDOR WITH PROPORTIONATE OCCUPANCY FEE FOR THE MONTH OF CLOSING (\$45.14 Per Diem x 19 Days) AND SUCCEEDING MONTH ALLOW VENDOR	\$ 2,230.64
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BALANCE DUE ON OCCUPANCY
 CLOSING PAYABLE AS NOTED
 BELOW

\$ 16,929.14
\$123,676.29

\$123,676.29

BALANCE DUE ON CLOSING PAYABLE TO COUTTS, CRANE, INGRAM, IN TRUST
 OR TO WHOM THEY MAY FURTHER DIRECT.

REQUIRED ON CLOSING A SERIES OF EIGHTEEN (18) POST-DATED CHEQUES
 COMMENCING SEPTEMBER 1, 1989 EACH IN THE AMOUNT OF \$1,372.99
 PAYABLE TO VICTORIA & LAWRENCE (YORKTOWN) LTD.

* (Additional "Extras", if ordered, will be reflected on the
 final statement of adjustments.)

E. & O.E.

Cheques to be made as follows:

1. Victoria & Lawrence (Yorktown) Ltd. Account # 4982-11	\$14,698.50 <u>\$ 2,230.64</u>
2. Coutts, Crane, Ingram, In Trust	

TOTAL	<u>\$16,929.14</u> -----
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As this was to be an investment property, Koenigsberg arranged to lease the unit to Oleh Wlasenko for \$800 per month although his obligations in occupancy fees with interest on his mortgage, property taxes and common expenses would cost him \$1,372.99 each month, as set out on a series of post-dated cheques.

Koenigsberg's cheques for May and June 1990 were returned as "N.S.F." and these were replaced although the N.S.F. charges of \$25.00 each were outstanding on June 19, 1990. Then the July and August 1990 cheques were also returned by Koenigsberg's bank as being N.S.F.; and again fees of \$25.00 each were claimed by the vendor's lawyer in a letter to Koenigsberg's lawyer on August 29, 1990.

That letter states:

.....
Failure to pay the occupancy fees is a default under the terms of both the Agreement of Purchase and Sale and Occupancy Agreement which may result in a termination of the Agreement and an action for damages.

Unless the default is cured within five (5) days of this letter, our client has instructed us to take appropriate actions to protect their rights.

In addition, you will note that your clients have previously forfeited the interest payable pursuant to the provisions of Paragraph 3 of the Agreement of Purchase and Sale which provides that default results in the loss of interest on the deposits.

A further letter was sent on October 11, 1990 which refers to four outstanding instalments for July, August, September and October together with \$150.00 in N.S.F. charges. Then Brenda Balzer, controller of the vendor wrote directly to Koenigsberg on November 13, 1990 as follows:

Further to our solicitor Denise Lash's letter of October 11/90 to your solicitor, Mr. Zimmerman, you advised me by telephone that it was your intention to remit outstanding charges in the amount of \$5,641.86 plus interest by Nov. 9, 1990.

You also requested that we hold your November 1/90 post-dated cheque for occupancy fees in the amount of \$1,372.99 until December 1/90 at which time you would also pay the December 1/90 occupancy fees for the same amount as well as interest charges.

On November 9, 1990 I telephoned your office and left a message for you to return my call. On November 12/90 you advised by telephone that the \$5,641.86 amount would be paid by November 16/90 (2 Instalments -\$3,500.00 and \$2,141.86).

We shall expect this payment on or before Nov. 16/90. No further extensions will be granted. Failure to meet this commitment will result in further legal action.

Please be guided accordingly.

On a memo to their solicitors on November 20, Brenda Balzer attached this letter and wrote:

.....
 We did not receive his payment by the specified date.
 On Nov.19/90 we received 2 cheques without explanation:
 Nov. 16 - 3,500.00
 Nov. 30 - 2,141.86 this was to be paid by Nov. 16
 5,641.86
 even after these payments he still will owe for Nov. \$1,372.99 and on Dec. 1 another \$1,372.99.
 Please send follow up letter to him. We can no longer agree to hold his post-dated cheque for Nov./90 or Dec./90.

The accounting statement by the Vendor for this file shows (Exhibit 6, tab 14) by handwritten entries that the \$3,500 was a payment received on November 20 and the post-dated cheque for November 30 for \$2,141.86 is also credited to the account so as to leave only the November 1st instalment balance of \$1,373.07 as being outstanding.

On November 28, Ronald Crane of the solicitors for the Vendor wrote again to Lawrence Zimmerman of Koenigsbergs'

solicitors:

We understand that you act on behalf of the above-noted individual with respect to his purchase from Victoria & Lawrence (YorkTown) Ltd.

For your information, we are enclosing a copy of our client's letter of November 13, 1990 addressed to Mr. Koenigsberg, the contents of which are self-explanatory.

Our client has not received payment as promised and the matter has now been referred back to this office for action.

Unless all arrears are paid within five (5) days of this letter, the Agreement will be terminated without prejudice to our clients rights, as set out in the Agreement of Purchase and Sale.

If arrangements are made for payment, payment should be made to our firm, in trust, in accordance with the accompanying statement.

Cheques were sent as requested and on December 4 by Fax and mail, Lawrence Zimmerman wrote as follows to Ronald Crane:

Further to the above noted transaction, our records show that the interim occupancy date for the above noted unit was June 21, 1989. Being that well over 16 months have elapsed since that time, and final registration has not been completed. This letter shall serve as notice of termination under the Agreement of Purchase and Sale. In accordance with the Agreement, kindly remit to Ronen, Zimmerman, in trust all of the deposits to date. In accordance with s.53(2) of the Condominium Act R.S.O. 1980, kindly remit all interest earned on the said deposit to date.

Thank you for your co-operation in this matter.

As the cheques were shown as being N.S.F. by December 6, the vendor relied on its rights to terminate the agreement and have the payments made by Koenigsberg forfeited.

There were further negotiations as set out in Mr. Crane's letter to Mr. Zimmerman on December 20, 1990 which stated:

We acknowledge receipt of your letter of December 4, 1990 which we forwarded to our clients' for comments.

Our clients have not made a final decision on the matter and I would point out that your clients have lost their right to the remedies sought on the basis that they have been in breach of the terms of the Agreement of Purchase and Sale by reason of default in payment of occupancy charges, the details of which are outlined in the accompanying statement.

In the circumstances, our client has taken the request under advisement and will provide us with a formal response in due course.

Mr. Crane wrote further on February 21, 1991 as follows:

We wish to advise that our client has accepted the notice of termination by your client and has requested the release of funds from the financial institution involved in the project.

In accordance with the Agreement of Purchase and Sale, the purchase monies will be returned to your client if all occupancy fees are in good standing, upon vacant possession of the unit and if upon inspection of the unit our client is satisfied that the unit is in a clean and proper condition.

Please advise as to when the unit is vacated and our client can inspect the unit.

Koenigsberg now claims from the New Home Warranty Program ("the Program") return of \$20,000 of the monies paid by him and has made a claim for the balance of his capital payments through an

insurance bond. The Program acknowledges that any payment made would be recoverable by the Program under this bond.

Koenigsberg began a Court action against the Vendor in December 1991 and obtained a default judgement in April 1992. The Vendor lost financial control of this project and the first mortgage is now in possession.

This appeal is additionally complicated by the Assignment in June 1990 by Koenigsberg of his interest in the offer to purchase the condominium unit to Anthony Crisanti as security for a loan of \$20,000 with a commitment to reassign if the loan is paid. Crisanti had made a claim for this \$20,000 to the Program, but the claim was later withdrawn.

To counsel for the Program, the issues are five namely:

Issue 1.

Who breached the agreement first? Did the Vendor fail to perform which the Program denies by stating that Koenigsberg breached his duty to make payments so that his capital payments are forfeit?

Issue 2.

Even if the Vendor had the right to breach the Agreement was the right waived after December 3, 1990?

Issue 3.

If Koenigsberg has no right to make an Assignment of his interests without the prior written consent of the Vendor (Schedule D, Item 12) then what is the effect of such an assignment?

Issue 4.

If Crisanti has not been repaid the loan, is there a set-off as Koenigsberg has received a benefit?

Issue 5.

If the claim made against the builder may be without merit, what is the effect of the default judgement of April 7, 1992 against the builder which is in the amount of \$38,377.17 in action 21319/91?

Counsel for Koenigsberg said that the assignment made by Koenigsberg to Crisanti was as a security one only and the amounts

on deposit with the Vendor since 1986 are the monies in question here.

Lawrence Zimmerman ("Zimmerman") acted as the solicitor for Koenigsberg on this purchase. He confirmed the purchase documents and that title never was received by his client. He agreed that Interim closing occurred on July 13, 1989, when Koenigsberg took possession of the condominium unit which was then rented to a tenant. Zimmerman said that termination was not declared when the July and August 1990 payments were outstanding nor when the four months of arrears were sought. He had no discussion with Koenigsberg about the November payment after being informed that arrangements had been made to pay this. Zimmerman thought that the payments were current as of December 3 and, therefore, the termination of the agreement on December 4 by his client was proper as he set out in his letter referred to earlier. In any event, he said that the termination right was not to be fettered by any outstanding instalments so that Koenigsberg's actions were appropriate and the deposit claim should be allowed. Eventually he noted that the November and December 1990 instalments were agreed by Koenigsberg as being outstanding and that they can be deducted from the total claim and would affect only the total in excess of the Program's \$20,000 obligation.

By the statement attached to Mr. Crane's letter to him of December 20 referred to earlier (Exhibit 7, tab 12), Zimmerman said that the outstanding amount shown to be owing is \$2,796.08 which is two instalments of \$1,372.99 plus an amount of \$50.10 for "Direct charges".

Zimmerman further said that no termination had occurred because as the letter states, "Our clients have not made a final decision on the matter..." He further noted that in a letter from Mr. Crane of February 21, 1991, the notice was said to have been accepted. No claim was advanced for interest or for the payments of January, February and March 1991, and the unit was surrendered by Koenigsberg.

In reply to Mr. Crane's letter of February 21, 1991, Zimmerman wrote on February 28:

I confirm receipt of your letter of February 21, 1991. Please be advised that at the time of our initial letter of termination, all payments were in good standing which has already been confirmed to me by your office as well as Bill Wiley of Victoria and Lawrence. Please be further advised that since our initial

letter of termination, the unit has been vacant and available for your inspection.

In light of the foregoing, I would hope that all monies will be returned without further delay.

Zimmerman confirmed that the Program had, in a decision letter of July 3, 1992, refused Koenigsberg's claim on two grounds:

- 1) Your client failed to pay the required occupancy charges as required pursuant to paragraph 2 of the Occupancy Agreement and paragraph 6, Schedule "D" of the Agreement; and
- 2) Your client has breached the Agreement by assigning his interest in the offer to purchase the unit without obtaining the Vendor's prior written consent as required by paragraph 5 of the Occupancy Agreement and paragraph 7, Schedule "D" of the Agreement.

On cross-examination, Zimmerman said he was told that the sum of \$5,641.86 was paid and that the cheque for the November instalment was being held for deposit in December so that there were no arrears as such when the termination was made on December 4, 1990.

Zimmerman said that Koenigsberg was in financial difficulty and the monthly loss on the unit was a drain on his finances. In Zimmerman's opinion, the reference in the letter of November 28 is not a termination which must be done in a more formal fashion. Zimmerman said that the assignment by Koenigsberg as a security would differ from an absolute assignment, but he is unaware of the details of any financial arrangements.

George Koenigsberg ("Koenigsberg") confirmed the terms of the Agreement of Purchase and Sale and of the amendment to add his wife Rochelle as owner and of the Interim occupancy of July 13, 1989 and the tenancy. He agreed that he had received all monthly payments from his tenant except for the last month's cheque which was N.S.F.. Koenigsberg said that his two cheques of November 16 and November 30 were both honoured by his bank and while he did not have records available to prove these payments, he simply relies on the records of the Vendor as presented to the Tribunal. He stated that the pressure to clear up the arrears in the letter of November 28, 1990 was met with his payments and that the November 1 and

December 1 payments were not meant to be shown as outstanding as their processing later was accepted by the Vendor.

Koenigsberg agreed that he had not sought the Vendor's approval for the assignment to Crisanti and that he did not inform the Vendor later of this document. He said that his wife Rochelle was a party to the agreement with Crisanti, although neither her name or signature appears on the documents (Exhibit 6, tab 24) and he was not asked anything further about that.

In the opinion of the Tribunal, the omission of Rochelle Koenigsberg's signature on this assignment would likely render the documents null and void so that no valid assignment was likely ever made and, therefore, the Vendor can have no reliance on these activities and neither can the Program.

Ronald Crane ("Crane") gave evidence as to his involvement in this matter. He said that the principals of the Vendor have gone and the Company has no office or operations. Barclay's Bank is the mortgagee in possession and registration of the condominium project occurred on February 27, 1991. He said that his letter of November 28, 1990 was a sufficient notice as his earlier use of "may" was replaced here with "will". He confirmed that his letter of February 21, 1991 stated that "Our client has accepted the notice of termination by your client", but said that all of the balance of two payments was to be received and then a repayment would be made without normal set-off procedures. He agreed that the deposit of Koenigsberg's cheques on December 3 would mean that their return as being N.S.F. would not be known by the Vendor the next day when the purported termination occurred by Zimmerman's letter.

Peter Smith ("Smith") is the insurance broker who arranged the Excess Condominium Deposit Guarantee for this condominium purchase (Exhibit 7, tab 4), with Alta Surety Company. He reviewed this file when the claim was received and sent a letter to Mr. Crane on March 28, 1991 as follows:

I enclose:

- a) Copy of your letter to Zimmerman of November 28, 1990 advising him of Sale Agreement termination unless all arrears are paid within 5 days.
- b) Copy of schedule dated November 28, 1990 showing outstanding arrears of \$3,514.95.

- c) Copy of November 1, 1990 N.S.F. occupancy fee cheque of \$1,372.99.

I also enclose December 1, 1990 N.S.F. occupancy fee cheque in the amount of \$1,372.99. Both these cheques were deposited by V & L December 3rd, 1990 and returned by the bank on December 6th.

- d) Copy of November 20, 1990 fax from Brenda Balzer which refers to a November 30 post dated cheque of \$2,141.86. This cheque is also shown on the November 28 schedule above. I can find no evidence of this \$2,141.86 cheque ever being deposited.

In any event the November 1st occupancy fee cheque bounced which means to me that all arrears were not paid within the five days and therefore the Sale Agreement was terminated by the developer on December 3, 1990 due to default by the purchaser. As I read the purchase agreement (clause 22) and occupancy agreement (clause 10), the purchaser's deposits become the property of the developer as liquidated damages, and the purchaser is not entitled to the deposits or interest.

As the Sale Agreement was terminated by V & L on December 3rd, the purchaser's termination of December 4th was not valid as the agreement had already been terminated.

I think it would be in order for you to write the purchaser's lawyer outlining these facts and further pointing out that purchaser is responsible for any damage to the unit during occupancy, and any loss that V & L sustains as a result of reselling the unit.

I also noted in the file that the May, July, August, September and October 1990 occupancy cheques were all returned N.S.F.

May I please have your immediate comments on this matter.

He said that requests were made for proof that this amount at d) was paid, but none has been tendered by Koenigsberg. On cross-examination, Smith agreed that the deposit on December 3 led to cheques being returned as N.S.F. which are in the file but could not say why the cheque referred to at d) would not be in the file if it had not cleared Koenigsberg's bank.

Anna Micoli ("Micoli") is the secretary and assistant to counsel for the Program and she made enquiries at Koenigsberg's bank as to the statements of his account being obtainable. She received a statement (Exhibit 9) of Koenigsberg's account for certain transactions on a "PowerLine" in October, November and December of 1990; and the two cheques for \$3,500 and \$2,141.86 do not appear thereon.

On cross-examination, Micoli admitted that she did not disclose who she was and did not give notice of this activity to either Koenigsberg or to his counsel. She did not know if the two cheques were initially drawn on this account and did not know of any other accounts there or elsewhere which Koenigsberg or his wife Rochelle may have had at the time.

In conclusion, counsel for Koenigsberg stated that \$20,000 plus interest is being sought by his client. He said that there is no dispute that \$37,454 was paid by Koenigsberg to the Vendor/Builder as of July 13, 1989. The builder is insolvent and the purchase transaction was never completed so return of the deposit was sought but denied. Counsel said that if Koenigsberg is entitled to a return of the deposit from the builder then he has a cause of action and the \$20,000 plus interest should be paid over by the Program. Counsel said that forfeiture by a purchaser is not automatic but is an option open to the builder which need then be properly exercised with a notice to either cure the default or suffer a forfeit. He said that as of December 3, 1990, no notice had been given and a curing period of five days is allowed in the agreement. Koenigsberg has a judgment against the Vendor, and the failure to defend the claim deems an admission of the truth of the claim in his opinion. He characterized the Program's decision as being based on the view that if the builder need not repay, then the Program is absolved but since a valid judgement exists the builder is bound to pay and so, therefore, is the Program.

In the alternative, counsel said that the inability to register the condominium project within 15 months of interim occupancy gave the option to Koenigsberg to cancel the transaction (Exhibit 6, tab 1, Schedule D, paragraph 6(b)). He noted that this provision is not fettered by any factor of default.

In his opinion, the receipt of late cheques and their deposit cleared off the four months of arrears and the Vendor had

agreed that the November cheque would be deposited on December 1, therefore there were no unarranged arrears as of the letter of November 28. Koenigsberg agrees that the November and December payments are outstanding and therefore a set-off should occur.

Counsel said that Koenigsberg believes that the two larger cheques were processed and the builder's records do not clearly show otherwise. Since five day's notice is allowed to correct any notice of arrears, the Vendor could not know on December 3 if there was a default outstanding since the cheques were not returned until December 6. Therefore, the notice given by Koenigsberg for cancellation of the agreement was in good time. If there was a termination by the builder as of December 3, then why he asks did the Vendor's solicitor Mr. Crane, write in the letter of December 20 that "Our clients have not made a final decision on the matter" (Exhibit 6, tab 17) and then there is the further letter of February 21, 1991 (Exhibit 6, tab 18) where Mr. Crane says that the client has accepted the notice of termination. Therefore, Koenigsberg had the legal right to terminate and did so on December 4, 1990; and a set-off would affect a calculation of the excess coverage claim as would a resolution if necessary of the validity of payment of the \$2,141.86. Counsel agreed that even if the \$3,500 had not been paid, there certainly was more than \$20,000 paid and Koenigsberg is entitled to recover that amount with interest from the Program.

Counsel for the Program said that only the deposit paid for the unit must be considered and that the parking space and the appliance package should not be included. Therefore, it may well be in her opinion that deductions for arrears and for the two payments of November 16 and November 30 may bring this claim below the total of \$20,000.

Since the Vendor/Builder here is no longer extant, she said that the Program can only rely on documents to resolve this claim. While the right of the Vendor to terminate was not exercised in October or early November 1990, she said that the sending in of two late cheques breached the agreement and the arrears were not paid up so that the Vendor had no duty to hold the November 1 cheque until December 1 for deposit. In her opinion, Koenigsberg sent in a variety of cheques which were routinely N.S.F. Since Koenigsberg's Trust Company account statement showed more than \$200,000 owing, it is most unlikely that the cheques of November 16 and 30 would have cleared that account. She sees the termination letter of November 28 as being effective; and the other later correspondence was only for negotiation.

Counsel is not certain if the \$3,500 was in fact paid in that the details of Exhibit 9 do not show the cheque as having cleared through that account. If the cheque was drawn on some

other account, she says that Koenigsberg must at least have to prove this payment. To her, it more than likely that the second cheque for \$2,141.86 was also not processed.

In reply, counsel for Koenigsberg said that the price of the garage space should be included in the claim as being an "appurtenance" as shown in the definition of "home" under Section 1(d) of the Ontario New Home Warranties Plan Act.

He said the cheques do not appear on Exhibit 9 because this is a credit card statement of transactions and cheques are processed through Account 13162509.. He then referred to clause 9 of the Occupancy Agreement (Exhibit 6, tab 4) which allows 10 days to remedy any default in payment of occupancy obligations and which since this is a document prepared by the Vendor/Builder should be held strictly against the Vendor/Builder's interest in this matter.

The Tribunal has considered the evidence in this claim and concludes that timely notice of termination of this agreement was given by Koenigsberg on December 4, 1990 and this was accepted by the Vendor/Builder as shown in Mr. Crane's letters of December 20, 1990 and February 21, 1991. Whether or not there were arrears, Koenigsberg had the right to terminate the agreement and therefore will recover his deposit of \$20,000 from the Program.

Since the parties knew that interest would be forfeited if arrears occurred, the Tribunal directs that interest on the deposit be calculated from January 1, 1991.

The Tribunal agrees that the parking space in question is an "appurtenance" within the meaning of "home" in the Act and finds that Koenigsberg has paid at least \$16,800 + \$11,198 + \$7,000. The Tribunal does not require any further proof by Koenigsberg of these payments.

The Tribunal finds that the Vendor/Builder did not clearly terminate the Agreement of Purchase and Sale and that Koenigsberg had the right to do so which he exercised. Questions may well be raised as to the proof of the payments of \$3,500 and \$2,141.86 and where a set-off of November and December instalments is agreed to by Koenigsberg. However, even with these deductions from the basic total of \$34,998, there would remain without question a deposit claim of more than \$20,000. No claim has been made for occupational rent for January 1991 where the resulting notice date should be January 31, 1991; nor for the February or March 1991 instalments. We find that the assignment to Crisanti is likely voidable as Rochelle Koenigsberg is not a party to it so the lack of involvement by the Vendor/Builder in that event is without consequence.

We find that the judgement against the builder which Koenigsberg obtained must stand on its own and that the Program would have to seek to have it set aside and defend any action if that was thought useful. Otherwise, the Tribunal will not go behind the judgement.

Accordingly by the powers granted to the Commercial Registration Appeal Tribunal by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay to George Koenigsberg the sum of \$20,000, together with interest thereon calculated from January 1, 1991.

DONALD LAWRENCE AND LUBA KUSHARIA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
GERRY BEECH, Member
HANS G. KEPPLER, Member

APPEARANCES:
STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 15 February 1993

Toronto

REASONS FOR DECISION AND ORDER

No one appeared herein for the Applicants. The Tribunal waited until 10.00 a.m. and, no one appearing, makes an Order pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act directing the Ontario New Home Warranty Program to disallow the Applicants' claims.

STEPHEN LEE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Chair, Presiding

APPEARANCES:

STEPHEN LEE, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 5 August 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Lee appeals the decision by the Ontario New Home Warranty Program to deny him compensation for a claim for a major structural defect. His claim is based on cracks in the foundation of his home causing a wet basement, cracks in the exterior brickwork and a dilapidated shower.

Counsel for the Program disputes that Mr. Lee's claim constitutes a major structural defect within the meaning of the Ontario New Home Warranties Act (the "Act").

The facts are as follows.

Mr. Lee purchased a new home located in Ajax from Woodheath Developments Ltd, a builder registered with the Program. The date of possession as shown on the Warranty Certificate is August 31, 1989.

On April 29, 1990, Mr Lee confirmed in writing that all required repair work to his new home had been completed to his satisfaction, with the exception of 30 items. These included complaints about "gaps in bricks, 30 to 40 places" and the finishing of the "ensuite bathroom [where] seal to ceramic tile peeling off".

On June 21, 1990, Mr. Lee confirmed in writing that all warrantable repair work detailed above had been competed to his satisfaction, with the exception of 3 items that are not relevant for the purpose of this hearing.

On June 16, 1992, nearly three years after he took possession of his home, Mr. Lee first complained in writing to the Program of cracks to the brickwork of his home. His Proof of Claim form, dated September 28, 1992, lists three complaints: a) foundation cracks creating a wet basement; b) cracking in the brick work; and c) a dilapidated shower.

On the Proof of Claim form, Mr. Lee also identifies the claim as one for a major structural defect. This is necessitated by the timing of his claim, which Mr. Lee recognizes in his Proof of Claim form. In it, Mr. Lee acknowledges that his claim falls within the five-year period, which covers major structural defects, and falls outside the first-year period, which covers other warranties, such as freedom from defects in material.

On October 16, 1992, the Program inspected Mr. Lee's home. On November 5, 1992, the Program reported the results of its inspection to Mr. Lee. All three complaints were investigated and found to exist.

The Program representative found minor cracks in the brick veneer of the house on the west and east walls. In the opinion of the Program, these cracks were caused by shrinkage of material after construction and did not affect the structural integrity of the home. In addition, water had penetrated through a crack in the foundation on the north wall. Finally, the Program representative noted that some of the tiles in the shower adjacent to the master bedroom had fallen off.

The Program also considered the results of a report dated October 22, 1992 and prepared on behalf of the builder by an engineer, Mr. Gordon Snowdon. Mr. Snowdon, who testified at this hearing, addressed only the problem of the cracking. He too considered that the minor cracks in the west and east walls were associated with drying and not "structurally significant".

Mr. Snowdon found wider cracks in the north wall and similar cracking in the south wall, although smaller and less extensive. His inspection revealed water penetration in the basement through cracks in both the north and south walls.

He recommended that the cracks in the masonry be repaired to prevent further water penetration and possible damage due to cycles of freezing and thawing. Also to be repaired were the cracks in the foundation in order to produce a watertight basement.

Mr. Snowdon attributed these cracks in the north and south wall to a rotation of the foundation wall caused by differential settlement. In his opinion, the consolidation of the soil supporting the foundation should have stabilized, given that the

building was constructed over three years prior to Mr. Snowdon's inspection. As a result, he believed further differential settlement of the foundation would be negligible and the cracks would likely not worsen.

Mr. Snowdon concluded in his report and testified in this hearing that in his opinion, the cracks were not a major structural defect because neither the load-bearing capacity nor the fundamental use of the home were detrimentally affected in any way.

The Program concurred with Mr. Snowdon's conclusions about the cracking in its report to Mr. Lee dated November 5, 1992.

Mr Lee's final claim concerned what he described as a dilapidated shower stall and what he evidenced by pictures. Mr. G. Beauvais, who represented the Program, testified that in his opinion the loose or missing tiles in the shower stall were caused by grout problems and lack of maintenance. Under cross-examination, Mr. Beauvais stated that the shower stall defects may have been covered under the first-year warranty but that it was difficult to assess now.

Nevertheless, as Mr. Beauvais stated, the shower stall structure was clearly not load-bearing within the meaning of the Act. Thus any shower stall defects did not affect the structural integrity of the home and fall within the meaning of "major structural defect". There is also no dispute that despite the problems with the shower stall the home can be still be used for the purpose for which it was intended.

Much turns upon the definition of a major structural defect, which is set out in section 1(o) of regulation 892 to the Act, and so it is worth setting out in its entirety:

"Major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,
i) that results in a failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of

materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

"Major structural defect" is defined in detail under the Act. It is clear that in order for a claim to be regarded as a "major structural defect" within the meaning of the Act, the claim must be based upon defective workmanship or material that materially affects either the load-bearing capacity of the home or its intended use.

The scope of this definition of "major structural defect" has been canvassed in other decisions by this Tribunal. Reference is made to the Comeau case, heard 17 January 1991, which in turn refers to the Fields case, found in volume 11 CRAT (1982), and the Feroze case, heard in July 1990. It is clear from these cases that the onus of proof is on the homeowner to establish that his claim falls within the statutory definition of "major structural defect".

Mr. Lee asks that this definition be disregarded on the basis of what appears to be the principle of strict product liability. He argues that he should be seen as a consumer of an expensive product - his home - and one who has suffered aggravation and alleged financial loss as a result of defects in that product. He asks to be compensated under the Act as a matter of fairness.

However, the Program is not legislatively empowered to provide compensation to homeowners on the basis of strict product liability. The Program's ability to provide compensation is limited by this statutory definition. The Program is mandated to apply this definition to claims and can provide compensation only to those homeowners whose claims fall within the scope of the Act.

The issue to be decided here is whether Mr Lee's claim based upon a) cracks in the foundation causing a wet basement; b) cracking in the brick veneer; and c) a dilapidated shower stall constitutes a "major structural defect" as defined under the Act.

Upon the evidence presented, Mr. Lee's claim does not constitute a "major structural defect" within the meaning of the Act. These defects clearly did not adversely affect either the load-bearing function of the home or the use of the home for the purpose for which it was intended.

Accordingly, by virtue of the authority vested in this Tribunal under section 16(3) of the Ontario New Home Warranties Plan Act, the Ontario New Home Warranty Program is directed to disallow the claim.

PAUL LIUT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
ANNE SONE, Vice-Chair as Member

APPEARANCES:

PAUL LIUT, appearing on his own behalf

RICHARD CARTY, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 8 November 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a decision letter dated May 18, 1993. At the conclusion of the presentation of the evidence in the case on behalf of the Applicant, counsel for the respondent moved for a non-suit. At the conclusion of the argument on this motion put forward on behalf of both parties, the Tribunal indicated that it intended to grant the motion for the non-suit and that written reasons therefor would follow.

The evidence and facts relevant to the making of the decision are the following. Sometime prior to March 1988, the Applicant and his wife entered into a transaction to purchase a new home built at 12 East Pike Road, Windsor, Ontario. This home was completed by the beginning of March 1988 and on March 3, 1988 a Transfer/Deed of Land was prepared from the vendor to the Applicant and his wife and on the same date, the Affidavit required by the Land Transfer Tax Act was completed. Also on the same date, there was an inspection of the house and a Certificate of Completion and Possession was completed dated March 3, 1988. The transaction was closed and the Applicant and his wife took possession of the property on March 4, 1988. The times limited for the making of various claims pursuant to the Ontario New Home Warranties Plan Act commenced to run on that date.

While both Mr. and Mrs. Liut are named as purchasers of the house and grantees of the property in the Deed and while only

Paul Liut is an Applicant in these proceedings, it was conceded on behalf of the Program that he would be entitled to make a full recovery of any claim which he could establish here without his wife also being a party to these proceedings.

The Applicant did establish in his evidence to the satisfaction of the Tribunal that there were and are defects in his home which would come within the provision of Section 13(1)(a)(i) of the Act. The evidence of the Applicant, supported by photographs which he produced as exhibits showed defects in the west wall of the house above the garage door being a reasonably extensive crack running in steps from the lintel above the door up nine courses of bricks to the top, a crack along the top of the lintel, and another vertical crack and a sag in the wall at the side. The Applicant also alleged that the steel lintel itself was not strong enough being only 1/4" in thickness when it should have been 5/16". He did not, however, produce an Ontario Building Code requirement or other evidence that the lintel was not as required.

The evidence and the photographs produced by the Applicant also established defects on the east wall of the house. The brick wall above the glass panelling forming the outer wall of a sunroom slopes on an angle away from the windows and in 10 courses of bricks slopes at least 3" falling away on a lean from the house. There is also some material between the bottom of the brick wall and the top of the window frame across the side of the building which is present at the two outsides and not present in the middle. Upon this evidence the Tribunal would have found, if it had been dealing with a one year warranty claim with notice given within the time limited by Section 13(4) of the Act, certain warrantable defects.

However, the Applicant faced two additional problems at this hearing, first that, in order to make any recovery, he had to establish that the defects constituted major structural defects within the definition set out in the Statute and the Regulations and secondly that, even if he could establish that they constituted major structural defects, notice was given within the five years limited in such circumstances.

It was on the basis of these two arguments that counsel moved for the non-suit and at the conclusion of the argument, the Tribunal had to agree that counsel for the respondent was correct in both of his submissions.

With regard to the notice issued, the time limited for the beginning of the notice is found in Section 14(1):

14.(1) Where,

-
- (c) the owner suffers damage because of a major structural defect as defined by the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

Within four years after the warranty expires means within four years of the expiry of the warranty period for all warrantable claims which is found in Section 13(4) of the Act:

13.(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

The method to be employed or the process to be followed in the making of claims under these sections is also prescribed in Section 4(1) of Ontario Regulation 892 made pursuant to the Act which states:

4.-(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

The making of a claim under any of the provisions of the Act is therefore equated with the giving of written notice thereof to the Program. The first written notice of any of these deficiencies which are the subject matter of the Applicant's claims was contained in a letter written by the Applicant to the Program on March 1, 1993. He posted it in an envelope addressed to an address on Eglinton Avenue East in Toronto which had not been occupied by an office of the Program for sometime. It was an old address which he had on some document. It was the Applicant's evidence that he posted it on March 4, 1993. The postmark on the original envelope shows that it was stamped by the post office on March 5, 1993. It is a fair inference from this evidence that the Applicant did post the letter on the date which he stated, but sufficiently late in the day that it was not picked up and stamped until the next day. In any event, having the wrong address it was eventually returned to the sender as the post office was unable to

deliver and he then obtained the correct address of the Program's office in Kitchener, Ontario and mailed the original letter with the envelope with the postmark showing the first mailing and this was mailed on March 24, 1993 and received and stamped by the Program on March 26, 1993.

The general rule of law with regard to requirements for the giving of notice is that notice must be given to or brought to the attention of the party within the time limited. Applying the requirements of the Act and the Regulations to the evidence of this case, the last day for giving notice was March 4, 1993. Even if we had a provision that the notice must be postmarked not later than the last date in question, the earliest postmark, on the letter addressed to a wrong address was March 5, 1993. There is no basis upon which the Tribunal can find in this case that the requirement for giving the notice on time were met by the Applicant.

In view of our finding on the foregoing point, it is not necessary to discuss at length the issue as to whether or not the defects which formed the subject matter of the Applicant's claim amount to major structural defects. Suffice to say that, on the evidence before us, the Tribunal would find that these defects do not come within that definition in the Regulations. A major structural defect is defined as meaning:

- (o) "major structural defect", means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,
 - (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
 - (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

Previous decisions of this Tribunal, some of which were cited to us by counsel for the Program, make it clear that the deficiencies established here do not result in any failure of a load-bearing portion of the building or materially and adversely affect its load-bearing function nor do they materially and adversely affect the use of the building for the purpose for which it was intended.

Therefore pursuant to the authority vested in it by the Ontario New Home Warranties Plan Act, the Tribunal hereby directs the Ontario New Home Warranty Program to disallow this claim.

THE MANORS OF SHERWOOD INC.
and
COPPARD FARM ESTATES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

APPEARANCES:
ALVIN D. MERMAN, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 23 November 1992 Toronto

REASONS FOR DECISION AND ORDER

These two hearings are in respect to a Proposal for each Applicant to revoke the registrations of the two Applicants on the basis of the past conduct of a director and officer of each of the Applicants, Mr. Peter Plastina.

The issue in respect to the proposed revocation of the licence of Manors of Sherwood Inc. is that Mr. Plastina as a director and officer of West Lynde Developments Inc. permitted that company to violate its statutory obligations giving rise to a payment by the Warranty Program out of its guarantee fund of a total of \$2,587.74 for warranted repairs. West Lynde Developments Inc. is no longer in operation.

The issue with respect to Coppard Farm Estates Inc. which continues in operation is that there has been a record of breach of its warranties and that there was a specific loss to the guarantee fund of \$1,107.45. Again reliance is placed upon the past conduct of Mr. Peter Plastina, a director and officer of Coppard Farm Estates Inc. and there is a cross-reference between the two proposals dealing with the fact that Peter Plastina has been an officer and director of all of the related companies. The total amount outstanding in respect to West Lynde and Coppard therefor amounts to \$3,695.19 which includes the 15% administration fee and the Goods and Services Tax. It should be noted that there is no

allegation against the Manors of Sherwood Inc. which is identified as a new company of which Mr. Peter Plastina is a director and officer. It is also acknowledged that in order to secure the renewals of the licences of the Manors of Sherwood Inc. and Coppard Farm Estates Inc., the Program has been paid the sum of \$3,695.19 under protest subject to the decision of this Tribunal.

Dealing first with the Proposal against Coppard Farm Estates Inc. This Proposal arose out of a claim with respect to a cold master bedroom of a home located at 43 Baylawn Drive in Markham, Ontario identified in a conciliation report made March 3, 1989. It was also acknowledged by all parties that the master bedroom which was located over the garage and was sunken from the balance of the second floor by two steps was cold. Mr. Plastina in his evidence indicated that similar situations had existed in two other homes in the subdivision and that these had been resolved by the installation of baseboard heaters at a cost of \$185 each to the builder. There is at least a tacit acknowledgment, therefore, by the director of the company Mr. Plastina, that some cost to remedy this defect was appropriate.

The evidence of the inspector for the Program was that while the other two homeowners accepted the baseboard heater remedy, the homeowner Mr. Rapuano would not in this instance. The inspector's evidence indicated that there were a number of problems with respect to the coldness in the master bedroom. He testified that a knee wall was constructed in this house in accordance with Building Code requirements, but that the cavity between the knee wall and the outer wall was open to the outside through ventilation grids in the soffit. In addition, the insulation bats were loosely attached and as a result, no effective air barrier was established; the air return register was positioned 5' above the floor base and because of the design of the home with the sunken floor and its location immediately above the unheated garage, a problem with respect to coldness in the floor was inevitable. The inspector testified that attempts were made to have the builder effect appropriate repairs, but such did not occur. Accordingly the Program prepared a Work Schedule which provided for the installation of a return air register close to the baseboard, holes to be cut into the walls to permit access to attach and seal the insulation, to install a 2,000 watt electric baseboard heater and then to repair the opening in the walls. The Program received two quotations, one for \$2,415 and one for \$1,025. It should be noted that in respect to the installation of the electric baseboard heater, the one quotation was for \$270 and the other for \$500.

Because the builder failed to respond to communications from the Program, working upon the lower of the two quotations and taking into account that the homeowner was prepared to do some personal renovation and would engage his own contractor, the

Program cash settled with the homeowner for \$900 which with an administration fee and Goods and Services Tax resulted in the invoice to the builder Coppard of \$1,107.45.

In the view of this Tribunal, the builder had an obligation to deal with this issue as it had with two other homeowners in the subdivision. The builder also had an obligation to work co-operatively with the Program to resolve the issue. The builder failed to do so and must accept the consequences of its inaction. The Tribunal finds that the cash settlement of the Program with the homeowner of \$900 was entirely reasonable recognizing that by the acknowledgment of the builder minimum rectification would involve the installation of a baseboard heater, which together with administration charges of the Program and Goods and Services Tax amounts to about one-third of the cash settlement.

With respect to the Proposal against The Manors of Sherwood Inc. this is based upon the failure of the predecessor company West Lynde Developments Inc. in respect to a residence at 22 Bluebell Crescent in Whitby. In this case, the conciliation took place on August 25, 1989 and the principal concern of the homeowner was with respect to ceramic tiles in the kitchen, laundry room, powder room and front entrance hall. The builder did not attend the conciliation. The builder's position taken with the Program and before this Tribunal was that no complaint having been identified at the time of taking possession, there was no way in which the builder could be held accountable for the cracks and it was submitted by the builder that this had been the practice of the Program on a number of occasions previously.

The Program's position was that if a claim was validly raised during the first year of possession, the Program would examine and make an assessment as to whether it was an appropriate claim or not, notwithstanding that it had not been identified at the time of taking possession. The purchaser in this case made a claim within a month of possession and identified cracks in the kitchen and breakfast room floor area, but did not specifically make a claim concerning the laundry room, powder room and foyer. The conciliator for the Program indicated that on his inspection, his view was that the number of cracks indicated that there was a defect in the tiles or in their installation and that they were too numerous for the homeowner to have been the cause inasmuch as they were randomly located throughout the main floor area.

Evidence was given that after the conciliation, a serviceman from the builder came out to replace the broken tiles. He replaced tiles in the foyer and some in the laundry room, but did not do anything with respect to the tiles in the kitchen and breakfast room area. Further communications emanated from the Program's office to the builder but the builder again reiterated

its position that it could not be responsible as these cracks had not been identified at the time of taking possession. In view of this rigid position of the builder, the Program was placed in the position that it could do nothing further but prepare a work schedule and send it out for tender. One quote was \$5,214.45 and the second was for \$2,103 plus Goods and Services Tax, and it was this lower quotation which was accepted by the Program, work was ordered, completed, paid for and then billed to the builder West Lynde Developments Inc., together with a 15% administration charge and Goods and Services Tax for the total of \$2,587.74.

In the course of evidence before us, the Program conciliator indicated that because of the lapse of time identical ceramic tiles could not be obtained and as a result, the Program directed the following work to be done:

1. Remove and replace two piece powder room ceramic tiles (which would also include the laundry room);
2. Remove and replace front foyer ceramic tiles; and remove and replace kitchen ceramic tiles.

In the course of the presentation before the Tribunal, it was acknowledged that the builder's workmen had replaced tiles in the foyer and in the laundry room and powder room. It further developed that the main floor of the home was not totally tiled, but that there was a large area of carpeting in the hallway between the foyer, powder room and laundry room on the one hand and the kitchen and breakfast room on the other. In the view of this Tribunal because of the carpeting in the hall visually separating these areas, there was no need to replace the foyer and powder room and laundry room. These areas amounted to a cost to the Program of \$1,062 and it was acknowledged by counsel for the Program that perhaps the Program should not have authorized this expenditure. Again because of the intransigence of the builder, this whole issue might very well have been resolved without the necessity of its coming before this Tribunal. The Tribunal determines therefore that West Lynde Developments Inc. was obligated to an expenditure for replacement of the kitchen ceramic tiles amounting to \$1,051 plus administration charge plus Goods and Services Tax because this item had been identified within the first year of possession and was determined by the Program to be warranted with which the Tribunal agrees in accordance with the evidence that has been presented to us.

Accordingly, the Tribunal finds that the builder West Lynde Developments Inc. is obligated to the Program in the amount of \$1,051 plus an administration fee of 15% totalling \$157.65 for a total of \$1,208.65 plus Goods and Services Tax amounting to \$84.61 for a total \$1,293.26. While West Lynde Developments Inc.

is no longer in business, the Tribunal finds that Peter Plastina as the directing mind of both West Lynde Developments Inc. and The Manors of Sherwood Inc. must be responsible for the actions of West Lynde Developments Inc. The Tribunal therefore finds that his past conduct in not dealing with this issue and taking a very rigid position with respect to the warranty is sufficient to permit the Program to refuse the registration of The Manors of Sherwood Inc. or to revoke its registration.

It is unfortunate that the attitude of the builder as represented by its director and officer Mr. Peter Plastina has resulted in the actions being taken by the Program. Had the builder in each case complied with its Vendor/Builder agreement and worked co-operatively with the Program, it is the view of this Tribunal that resolution of these matters would have resulted without the necessity of proceeding to this Tribunal.

Pursuant to the authority vested in it under the Act therefore, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to register Coppard Farm Estates Inc. upon the following condition; namely, the payment or release by the Applicant to the Program of the sum of \$1,107.45.

Pursuant to the authority vested in it under the Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to register The Manors of Sherwood Inc. upon the following condition; namely, the payment or release to the Program of the sum of \$1,293.26. The balance of funds held by the Program in the amount of \$1,294.48 shall be returned to the Applicant The Manors of Sherwood Inc. or as may be agreed upon between The Manors of Sherwood Inc. and the Program.

DAVID MARCUCCI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:
MAE CHENG, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 30 June 1993 Toronto

REASONS FOR DECISION AND ORDER

No one appearing for the Applicant by 10:00 o'clock in the forenoon, upon the application of counsel on behalf of the Respondent, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicant.

The above decision and reasons therefor were orally given by the Vice-Chairman at the conclusion of the hearing in the presence of the other members who concurred.

PATRICIA MARQUIS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
SELWYN CHARLES, Member
D.H. MACFARLANE, Member

APPEARANCES:
PATRICIA MARQUIS, appearing on her own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 12 November; 21 December 1992 Toronto

REASONS FOR DECISION AND ORDER

On February 20, 1989, Ms. Patricia Marquis ("Marquis") agreed to purchase a condominium unit #301 at 1905 Pilgrim's Way in Oakville from Urbandale Realty Corporation Limited ("the builder"). The purchase price was \$199,000 and a downpayment of \$10,000 was made on March 3, with a further payment of \$10,000 made on March 28, 1989. The date of possession was to be June 8, and Marquis moved from Belleville to Oakville on June 6 to find that her unit was not ready for occupancy. Her possessions were stored in an unfinished unit and she lost the advantage of having these possessions unpacked by the mover, for which her employer would have paid.

A further possession date was agreed for June 15 but the unit remained unfinished, and possession was taken on June 23, 1989 when a Certificate of Completion and Possession (Exhibit 16) was completed. As the unit was liveable, Marquis moved in but within two weeks the refrigerator failed and a new one was put into her unit.

By early August, Marquis had noticed that the floors of her unit had slope problems and that wood shims were needed to level her furniture. She measured her wall heights and found up to a 2" difference. The builder's foreman and building superintendent agreed, said Marquis, that the floor slopes were excessive. A new

vinyl flooring pattern had to be chosen and Marquis was moved to a penthouse unit on November 14 for a 10-day period while repairs were to be done. Marquis returned to her unit on March 14, 1990; four months had gone by. Marquis said that there was confusion as to the responsibility for the problem among "the engineer, the design, the contractor who poured the cement or Urbandale's own people".

The history of the situation was carefully written by Marquis on February 28 and received by the New Home Warranty Program ("the Program") on March 5, 1990. The floor repairs were not satisfactory, but Marquis closed her purchase as of January 25, 1990.

A conciliation was requested by Marquis for her outstanding claims and an inspection was made by Andy Richters ("Richters") of the Program on May 1, 1991. Marquis now appeals from that report with respect to eleven items either not attended to by the builder or which should, in her opinion, be attended to by the builder.

1. Floors in her unit are not level with slopes of $\frac{3}{8}$ " to $\frac{1}{2}$ " over 4' of measurement. Marquis provided room sketches to show the slope (Exhibits 4, 5, 6 and 7), and particularly complains about the area under her dining table. On cross-examination, Marquis said that she showed all of the slope areas to Richters on May 1, 1991, but he placed her claim in the "A(2)" unwarranted schedule with the comment:

The floors throughout the unit appeared to be within the tolerance of the industry and no unusual unevenness could be seen during visual inspections.

2. Ceiling cracks have appeared running the length of the walls about 2" from the edge of the other wall junction. These locations are shown on Exhibit 6 and 10 and by photographs 1 to 11 on Exhibits 8 and 9. Marquis noted that in the conciliation report, Richters found this to be a unwarranted item as it was due to natural shrinkage and exempt from warranty under section 13(2)(d) of the Ontario New Home Warranties Plan Act ("the Act").
3. Interior walls are warping and shadows can be seen where the ceiling cracks are also noticeable. Marquis stated that this was reported to the builder and is referred to in the builder's letter of January 11, 1991. She noted that Richters found the claim to be not warrantable as there was no complaint in writing about this matter sent

in to the Program within one year beginning June 23, 1989.

4. Ceilings not level. Marquis said that she did not recall raising this matter at a conciliation inspection by Richters, but earlier had referred to this in her letter of February 28, 1990. She noted that the floor slope, together with the ceiling slope brought wall height variances of 1" to 2" in various locations in her unit.
5. The countertops in the "galley" style kitchen are not equal in height; but one is 1 1/8" lower than the other. The conciliation report calls the difference 1 3/8", but places the item as unwarranted and finds:

Since this complaint concerns aesthetic imperfection in the quality of finish rather than a defect which impairs performance, function or durability, no further action is required by the builder.

Marquis said that the counters are operational, but the movement of items from one to the other requires raising or lowering and this is inconvenient, unsafe and noticeable.

6. When the vinyl flooring in the kitchen was replaced, one of the small squares was pierced so it was cut out and a new square put in, the result of which repair is a noticeable outline. In addition, the relaid floor portion is in two pieces and has a seam which is noticeable to Marquis. The photographs 8 to 13 in Exhibit 11 show her concern; and Marquis wants the floor replaced with a one-piece installation.

In the conciliation report Richters placed this claim on the "A(2)" unwarranted schedule with the comment:

Approximate 2" square piece of the resilient flooring of the kitchen at the archway of the living room and the seam at the end of the cabinets appeared to be carried out in a good and workmanlike manner and no further action is required by the builder.

On cross-examination, Marquis stated that these two items with respect to the kitchen floor will become more noticeable over time.

7. Marquis claims that the seams in her carpeting show, and that there is fraying of the carpet under the threshold metal bars. This was complained of in her earlier letters and a repair was attempted on October 3, 1990 which she stated on October 11, 1990 had not been successful.

In the conciliation report Richters placed this item in the "A(2)" unwarranted schedule with the comment:

Not warranted since the Warranty Program is not in a position to judge upon damaged items, unless the items in question are promptly reported, in writing, at the time of occupancy on the Certificate of Completion and Possession.

8. The wooden frame for a closet shelf has come away from the wall and while the builder was directed to repair this as a Schedule "A(1)" item, Marquis claims that this has not been done, and presented photos 14 and 15 in Exhibit 10. She said that when this was first raised at the conciliation inspection on May 1, 1991, the builder had attempted repairs on October 2, 1990. Since there is only knitting wool in boxes on the shelf, she sees no heavy weight which would cause the shelf support to give way.
9. Marquis also claims that her unit is subject to noise from the neighbours above her by walking and piano playing, as well as having a plumbing hammer noise of water for the dishwasher and through other use. She complained to the builder directly about the noise.
10. Marquis claims that on moving into her unit, valances on her custom blinds were bent and a crystal glass was chipped which she valued at \$15 to \$20. The builder noted in a letter to her on January 11, 1991:

With respect to your crystal glass, we have been unable to find a replacement and will remunerate you for its loss once you produce the invoice for its purchase.

11. Marquis reviewed the claim of cuts in the resilient flooring at the archway between the kitchen and living room and agreed that they were not reported on the Certificate of Completion and Possession.

In the conciliation report, Richters had noted as Item 3 on the "A(2)" schedule that:

Not warranted since the Warranty Program is not in a position to judge upon damaged items, unless the items in question are promptly reported, in writing, at the time of occupancy on the Certificate of Completion and Possession.

Marquis said that throughout her situation, she had not been able to occupy her unit for eight or nine months after June 23, 1989, so that the year in which she could report items and claims should not be held strictly to the three months of her actual occupancy.

The first witness for the Program was Peter Britton ("Britton"), who was the Assistant Superintendent for the builder and was familiar with Marquis and her concerns over repairs which he supervised and in fact, did some himself, he said. He gave evidence on five of her complaints as follows:

1. Britton said that the slope of the floor resulted from the pouring of the cement floor slab during construction. He said that a compound was used to level up the floors after the rugs were taken up in Marquis' unit, and that both a 4' level as well as a transit were used to bring results acceptable to him. He said that this problem is not uncommon as 8" thick floors are poured in high-rise buildings.

5. Britton said that the counter top height difference resulted from the need to have a higher counter over the dishwasher to allow access for maintenance.

6. Britton said that the kitchen floor was first laid in two pieces with the usual seam, but was taken up for floor levelling and replaced by a one-piece vinyl sheet. When the rear portion needed to be taken up again for further levelling, a piece of the same lot and dye was installed so that the result was in effect what the original situation would have been. He agreed that one square was damaged and replaced, and said that there is no defect in the workmanship or materials in the way that the repair was done or in the normal result of a seam.

6. Britton agreed that the carpeting in Marquis' unit was lifted three times and that seams had opened up. He said that the carpet was retucked on November 20, 1990 and that the four concerns set out in the conciliation report on Schedule "A(1)" as warranted, were fixed. Britton thought that the carpet was in good shape and he had not noticed any fraying at the door thresholds.

To him the carpet is normal with some wear from walking and vacuuming.

8. Britton said that he had repaired the shelf problem with another worker as the left-hand support was pulling away from the wall. He recalled some heavy boxes on the shelf which had to be removed before the first repairs were done. He said that glue and self-tapping drywall screws were used to attach the support into the metal interior studs.

Bob Winters ("Winters") has been a condominium inspector with the Program for four years and had earlier experience as an inspector for C.M.H.C. and as a contractor and cabinet maker. He confirmed the date of possession for this unit to be June 23, 1989 and stated that the problems of the floor slope (Item 1) and the carpeting (Item 7) were mentioned initially by Marquis. When the conciliation inspection was requested in late June 1990, Winters said that a list was attached which referred to Marquis' claims 1, 2, 5, 6, 7 and 10. Winters said that the builder received a copy of the list on July 17, 1990 with the hope that some items would be attended to. Winters went through the unit with three representatives of the builder on October 11, 1990 to review a list left by Marquis and noted some items being repaired. In a letter of October 30, 1990, Winters set out his view of the eight items on that list with the numbering as shown being for the current outstanding list of Marquis' claims.

1. The floors were checked with a 4' - 0" level and they were within industry standard.
7. The carpet was inspected and only re-kicking was required in two places. The seams are acceptable. The builder agreed to re-kick the carpet after discussion with you.
6. The kitchen floor installation is acceptable. The vinyl does require cleaning at the one square patch. The builder agreed to this.
5. The difference in counter top heights is only 1 1/8". This is not considered a warrantable item because it is not a building code infraction and the counter tops are installed with good workmanship.
2. The cracks in the ceiling are from the drying out/settling process of the building. They are within industry standards.

9. The sound transmission is being investigated by the builder and his consultant. He will be conducting tests and rectify the situation. Because this is a common element problem, please contact Mr. Poland for progress reports.

The other two items referred to in the letter of October 30, 1990 were otherwise attended to. Winters said that there was no reference to the noise concern (Item 9) in writing to the Program in the first year ending June 23, 1990.

Winters then referred to Marquis' letter of January 8, 1990 where she stated that she wanted a conciliation inspection and that the carpet seams (Item 7), the vinyl flooring patch (Item 6), and the ceiling cracks (Item 2) remained of concern to her. Winters said that in a letter of January 11, 1991, the builder reported repair of the closet shelf (Item 8) which was the first time the Program had heard of this matter. The builder was evaluating the noise concern (Item 9) and progress in certain other matters was said to be underway. Winters said that he usually does common element concerns in condominiums, therefore the conciliation inspection was attended by Richters on behalf of the Program.

On cross-examination, Winters agreed that there were wall height differences in the unit; and that a number of unit owners expressed concerns about noise and other matters at a meeting arranged by the Board of the condominium which he attended on October 11, 1990. He said that the noise concern was treated as a common element problem and that the Board has written to state that the problems are resolved satisfactorily.

As to the standards for floor slopes, Winters said that a guideline is $\frac{1}{4}$ " in 4' for a wood-framed house. Further, that $\frac{3}{8}$ " would be acceptable in a corner of a room in Marquis' unit. Winters repeated his view as to the ceiling cracks being caused by normal drying and that the rooms were properly taped before finishing was done.

Andy Richters ("Richters") has been a warranty representative with the Program for twelve years and has more than 40 years experience in all facets of residential construction. He did the conciliation inspection on May 1, 1991 and reviewed his comments on the current outstanding items referred to earlier in the evidence of Marquis.

On the Schedule "A(1)" list of the conciliation report, Richters noted that all items remain in issue as Item 7 includes numbers 1, 3, 4 and 5 and Item 8 refers to number 2. He said that no notice was given in writing about the shelf (Item 8) within the

first year of occupancy, but that this was raised at the conciliation inspection and the builder agreed to fix it.

Richters said that there was no Ontario Building Code infraction on the slope of a poured concrete floor in this highrise condominium, since the only guideline reference of $\frac{1}{4}$ " in 4' applies to a wood-framed house.

Richters said that the valance and chipped glass matters (Item 10) were not raised at the conciliation inspection and that the water hammer noise concern (Item 9) was not reported until July 8, 1991.

On cross-examination, Richters said that the kitchen counter differential (Item 5) was explained by the builder as necessary to keep the door sizes the same and that since there is no height reference in the Ontario Building Code, the complaint was not allowed.

In conclusion, Marquis reviewed her eleven items. For her sloping floors (Item 1), she believes that the transit was incorrectly used as the slopes remain after several attempts to level them. As to the rug coming away from the thresholds and the visibility of seams (Item 7), Marquis said that she is alone in her unit so that the cause could not be one of heavy traffic. She recognizes that repairs to floors, ceiling cracks, variances in height, and interior walls would be expensive as she would have to be moved out of her unit and accommodated elsewhere during construction. The kitchen counter differential (Item 5) can only be repaired by taking out the cupboards in her view; and the vinyl concern (Item 6) should be resolved by replacing the present flooring. She wants her closet shelf (Item 8) repaired and the water hammer noise (Item 9) resolved. She said that none of the problems complained of are her fault and that she has been seriously inconvenienced and frustrated since June 1989.

Counsel for the Program reviewed the warranty principles set out in Section 13(1)(a) of the Act and said that all items of complaint had to be brought to the notice of the Program in writing within one year of the date of possession which was June 23, 1989 (Regulation 726, section 4(1)). Since liability "is limited to damages to the home only" (Regulation 726, section 6(6)), any claim for compensation for inconvenience could not succeed in his opinion.

Counsel set out the position of the Program in each of the eleven claims as follows:

1. The floors slope measurements were taken on top of the carpet and showed up to $\frac{3}{8}$ " on a 4" length.

As a transit was used to check the result of repairs and both Winters and Richters said that the slope is not unusual or excessive, the claim should be disallowed.

2. The ceiling cracks which show in the recent photographs have developed over two years since June 23, 1989. The cause could not be excessive humidity due to floor repairs, as Britton had said that a plasticized compound was used to level the floors. These are usual shrinkage results and are not warranted.
3. The warping of interior walls was first raised at the conciliation inspection on May 1, 1991 and that was more than one year after possession so that no warranty can apply. There is no proof of any relationship between this complaint and the slope of the floor or ceiling, said counsel.
4. The ceilings are not level which is the likely result of the upper floor slab being poured. There is no movement here and the first reference to this concern was on May 20, 1991, which was more than one year after possession.
5. While the kitchen counters differ in height by about 1 3/8", this is a necessity in order to have service access to the dishwasher. There is no defect in workmanship or materials, no requirement in the Ontario Building Code and this is not noticeable but only aesthetic.
6. The seal and patch on the kitchen vinyl resilient flooring are only moderately noticeable as dust may adhere to the clear glue edges so that a good cleaning is all that is needed here. Certainly the flooring does not need to be replaced. The same dye lot of vinyl was used in the repairs by the original installer, and Richters finds the result acceptable.
7. While the photographs show a noticeable seam and some fraying under the metal thresholds, counsel said that Britton had noted that repairs were done. The wear and tear is normal after two further years from November 20, 1990 and this should not be considered as a warranted claim.
8. The closet shelf claim arose at the time of the conciliation inspection on May 1, 1991, which was almost two years after possession.

Britton said that he had done repairs on October 2, 1990 and that any problems would likely have been caused by heavy boxes causing strain on the shelf afterwards.

9. The claims for noise are a common element concern and
and 11. the Board of Directors of the condominium did say that repairs were satisfactory. In any event, Marquis' claim for this and for the cuts in the vinyl flooring were not made to the Program in writing within one year after possession.
10. This claim about the damaged valance and the glass are not "damages to the home only" and are an issue between the builder and Marquis directly.

The Tribunal has considered the evidence given on the eleven items raised by Marquis. We find that the floors are acceptable after the repairs were done and are within tolerances for a poured concrete slab building and we disallow the claim for Item 1. We find that Items 2, 3, 9 and 11 were not reported within the one year of occupancy and we disallow those claims.

We find that the ceiling being not level is not an infraction of the Ontario Building Code and that the kitchen vinyl flooring is acceptable so that we disallow Items 4 and 6.

Accordingly, by virtue of the authority vested in the Commercial Registration Appeal Tribunal under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program:

- a) to pay to Marquis the sum of \$150 for the inconvenience of the height differential in her kitchen counters (Item 5);
- b) to pay to Marquis the sum of \$30 for the bent valances and chipped glass (Item 10);
- c) to repair the carpet seam and to repair the frayed edges by using wider thresholds, if necessary (Item 7); and
- d) to repair the closet shelf (Item 8) by ensuring attachment to the interior wall studs and by using a centre support to the shelf and rod if needed to a value of \$50.00.

EILEEN MCGIVERN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:
DAVID GLU GOSH, agent for the Applicant

IAN ANDERSON, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 5 November 1992 Toronto

REASONS FOR DECISION AND ORDER

This was an appeal from a decision of the Ontario New Home Warranty Program (the "Program") disallowing Mrs. McGivern's claim for payment of the sum of \$4,000 from the Program's guarantee fund. The Applicant was not present at the hearing and no viva voce evidence was heard by the Tribunal. Rather, the matter proceeded on the basis of certain agreed facts which may be stated as follows:

1. On April 28, 1990, Mrs. McGivern entered into a written reservation agreement in respect of a proposed condominium unit. At that time, she paid the sum of \$5,000 as a reservation fee to Preston Heights Estates Ltd. ("Preston"), the prospective vendor named in the reservation agreement.

2. Subsequently, after reviewing her financial situation and concluding that she could not afford to purchase the condominium unit, Mrs. McGivern advised Preston that she had changed her mind and requested a refund of the \$5,000 amount.

3. At Preston's demand, Mrs. McGivern signed a release on May 31, 1990, releasing Preston from its obligations under the reservation agreement. While the release recites the fact that the sum of \$5,000 had been received by Mrs. McGivern, in fact only the sum of \$1,000 was refunded to her by Preston.

4. Mrs. McGivern has been unsuccessful to date in her attempts to obtain a refund of the balance of the monies paid to Preston.

The claim for recourse to the Program's guarantee fund is made pursuant to section 14(1) of the Ontario New Home Warranties Plan Act (the "Act"), which provides as follows:

14(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

the person is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The main issue to be decided is whether Mrs. McGivern, having paid monies to Preston pursuant to a reservation agreement, is entitled to be compensated for her financial loss from the Program's guarantee fund.

The agreement signed by Mrs. McGivern was clearly headed reservation agreement in bold type. The agreement describes Mrs. McGivern as the "Prospective Purchaser" and Preston as the "Prospective Vendor" and provides that "in consideration of the sum of Five Thousand \$5,000.00 dollars (the "Reservation Fee") now paid by the Prospective Purchaser to the Prospective Vendor, the Prospective Vendor reserves the potential sale to the Prospective Purchaser of Unit 302 as outlined on the attached plan, being contained in a development project at 3554 Linden Avenue, Cambridge, Ontario." (emphasis added)

The other relevant provisions of the reservation agreement are:

"2. In the event that the Prospective Vendor, in its sole discretion, decides to make available the Unit for sale, the Prospective vendor shall so notify the Prospective Purchaser by personal service or by mailing a prepaid post notice to this effect to the Prospective Purchaser at the address set out hereinafter.

3. The Prospective Purchaser shall have ten (10) clear business days from the date of personal service or mailing of said notice to attend at the sales office of the Prospective Vendor as designated in the said notice, during business hours to sign the Prospective Vendor's standard form of Agreement of Purchase and Sale (the "Offer") with respect to the Unit which Offer shall specify a purchase price of \$ONE HUNDRED AND FOUR THOUSAND NINE HUNDRED Dollars (\$104,900.00).

4. The obligation of the Prospective Vendor shall be limited only to the mailing of the notice as hereinbefore provided and the Prospective Vendor shall not be responsible for delays in postal service or for the failure of the Prospective Purchaser to sign that within the time limits provided herein.

5. At the time of signing the "Offer", the Prospective Purchaser shall provide the Prospective Vendor with a (Deposit) of TEN THOUSAND DOLLARS (\$10,000.00) by certified cheque. The Deposit shall then be credited as against the purchase price.

6. In the event the Prospective Purchaser fails to sign the "Offer" within the time specified in Paragraph 3 hereof then it is agreed that the Reservation Fee shall be returned to the Prospective Purchaser without interest upon delivering a signed release to the Prospective Vendor.

7. In the event the Prospective Vendor cannot complete, or will not make available the unit for sale for any reason whatsoever its sole discretion, this Agreement shall be at an end and the Prospective Purchaser's Reservation Fee paid herewith as a consideration for the execution of this Reservation Agreement, shall be returned to the Prospective Purchaser without interest upon delivering a signed release to the Prospective Vendor and each Party hereto releases the other from all claims and demands whatsoever.

8. The aforementioned "Offer" will contain an agreement that the aforementioned "Reservation Fee" will be held by the Prospective Vendor and applied on the monthly rent payable under the Interim Occupancy Agreement which commences when Unit is ready for occupancy.

9. This Agreement is personal as between the Prospective Vendor and the Prospective Purchaser and shall not be construed as an Agreement with respect to an Interest in land. The Prospective Purchaser will not register or deposit this Agreement nor Notice of this Agreement on the title to the lands."

It is clear from the foregoing provisions that Preston, as the Prospective Vendor, has no obligation to actually sell a condominium unit to Mrs. McGivern the Prospective Purchaser. The Prospective Vendor has the sole discretion as to whether or not to make the unit available for sale. The Prospective Vendor can decide not to make the unit available for sale for "any reason whatsoever". The Prospective Vendor's only obligations under the reservation agreement are to notify Mrs. McGivern if it does decide to proceed with a sale of the unit, and to give her the opportunity to sign an agreement of purchase and sale within ten business days after the notice is sent out at a purchase price of \$104,900.00, and with a deposit of \$10,000. If no agreement of purchase and sale is signed, either because Preston decides not to offer the unit for sale, or because Mrs. McGivern decides not to purchase it, then the reservation fee is to be returned to Mrs. McGivern in exchange for a release. If an agreement of purchase and sale is entered into, the reservation fee is to be credited against future occupancy fees.

In construing and applying section 14(1)(a) of the Act to these facts, it is necessary to consider the following definitions in section 1 of the Act:

- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;
- (1) "sell" includes entering into an agreement to sell;

Also of assistance are the following provisions of Regulation 726 under the Act:

- (6) (1) A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

and the definitions of the terms used in Regulation 726:

- 1.(r) "purchase agreement" means an agreement between a vendor and any person providing for the purchase by such person of a home;
- 1.(s) "purchaser" means a person who enters into a purchase agreement with a vendor for the purchase of a home and includes an assignee of the purchaser's interest in a purchase agreement.

The rules of statutory interpretation require legislation to be viewed as remedial and given a fair, large and liberal construction and interpretation as best insures the attainment of its objectives. (see the Interpretation Act, R.S.O. 1990, section 10.) Clearly the intended purpose of the Ontario New Home Warranties Plan Act is consumer protection, specifically protection of purchasers and owners of new homes. Accordingly the provisions of the Act should be interpreted in a manner consistent with this objective.

However, while the Act should be liberally and largely interpreted with a view to insuring the attainment of its objectives, it is not in our view appropriate to interpret the Act so liberally as to extend its application beyond the ambit of what the language clearly covers. This is particularly true where, as is the case here, the statute is creating a new right or remedy that did not exist before, i.e. a right to compensation from the Program's guarantee fund. Despite the Act's intended purpose of consumer protection, the right to recourse against the guarantee fund cannot be extended beyond the entitlement specifically given by the Act, and cannot be extended beyond those parameters in order to advance the objective of consumer protection.

As well, the Act must be read as a whole and interpreted in the context of its overall framework. The Act requires vendors and builders to be registered with the Program before they can act as vendors or builders. The protection afforded by the Act to consumers, including recourse to the guarantee fee under section 14 of the Act, is clearly intended to apply to dealings between consumers and persons who are required to be registered with the

Program, namely vendors and builders as those terms are defined in the Act. It was not, in our view, intended that consumers dealing with persons who do not fall within the definitions of "vendors" and "builders" and who, therefore, are not required by the statute to be registered under the Program, would nonetheless be entitled to claim against the guarantee fund.

In the case before the Tribunal, the applicant must be able to demonstrate that she clearly falls within the language of section 14(1)(a) and within the definitions that that provision derivatively depends upon. This requires, inter alia, that the contract pursuant to which the claim is made be "a contract with a vendor for the provision of a home". A vendor, in turn is defined as a "person who sells...a home" and "sells" includes entering into an agreement to sell. Accordingly Mrs. McGivern is not entitled to relief from the guarantee fund unless she can satisfy the Tribunal that the reservation agreement was on its terms an agreement to sell a home. This is clearly not the case. The reservation agreement in no way obliges Preston to sell a condominium unit to Mrs. McGivern. Preston is completely at liberty not to proceed with the development at all or to refrain from offering the condominium unit for sale. There is no obligation on Preston to complete its promise of sale. Indeed, there is no promise of sale. The reservation agreement merely contemplates the possibility of a future agreement of sale, should Preston elect to offer the unit for sale, (in which case it would have to notify Mrs. McGivern) and should Mrs. McGivern elect to accept that offer by entering in an Agreement of Purchase and Sale.

Furthermore, payment out of the guarantee fund pursuant to section 14 of the Act is expressly subject to the limits fixed by the regulations. Section 6 of Regulation 726 (quoted above) clearly contemplates that claims pursuant to Section 14(1)(a) of the Act will be made by a purchaser in respect of a purchase agreement, i.e. an agreement with a vendor providing for the purchase of a home by the purchaser. This further supports the view that no claim is supportable where, as is the case here, the claimant cannot be described as a person who has agreed to purchase a home pursuant to a purchase agreement.

The decision of this Tribunal in Victor S. Wilcox (1980) CRAT 104 was that no valid claim exists against the Program where the claim is made on the basis of an option to purchase a home where the option was not exercised and where, therefore, the agreement of purchase and sale ever came into existence.

In Carvalho and Tavares, a recent decision of this Tribunal released on October 26, 1992, the Tribunal found that the Wilcox decision had been superseded by the judgement of the Ontario Court of Appeal in Platinum I. Property Ltd. vs. Ontario New Home

Warranty Program (1991) 1 O.R. (3d) 513. In Carvalho, the Tribunal held, in a fact situation that is in all material respects identical to the facts in this case, that a claim against the guarantee fund could be successfully made on the basis of a reservation agreement. We are advised that the Carvalho decision is currently under appeal.

We respectfully disagree with the reasons and result in the Carvalho decision as well with the inferences drawn from the Platinum case and the application of those inferences to reservation agreements.

In Platinum, the Ontario Court of Appeal considered whether the Ontario New Home Warranties Plan Act applied to certain agreements for the purchase of limited partnership interests in a condominium development where the agreements included an option in favour of the investor to obtain a transfer of title to a specific condominium unit once the project had been registered. The question before the Court of Appeal was whether the developer was a "vendor" within the meaning of the Act, and, therefore, required to register with the Program, and inter alia, post deposit protection security with the Program. Consideration of the meaning of the term "vendor" in turn entailed consideration of the definition of "sell" in s.1(1) of the Act and specifically the meaning of "an agreement to sell". The Court of Appeal cited a passage from the decision of the United States Supreme Court in Treat v. White, 181 U.S. 264 (1900), that "an agreement to sell is simply an obligation on the part of the vendor to complete his promise of sale." Although the agreement before the Court of Appeal clearly imposed a positive obligation upon the vendor to transfer title to the unit to the investor, at the investor's opinion, the Court of Appeal found that this factor alone was not determinative of whether or not the agreement to sell the unit within the meaning of the Act.

At page 519 of Platinum, Mr. Justice Carthy, who wrote the reasons for decision states: "It is tempting to reach out to the high authority of Treat v. White and conclude that no matter how you describe the agreement before us it is an agreement to sell. However, in the same opinion Mr. Justice Brewer recognized that even the letter of a statute may not control if there is reason to suggest that the legislature intended otherwise." The Court of Appeal went on to consider the essential nature of the transaction and to characterize its prime thrust as tax driven scheme allowing a purchaser to join with others in the business of renting housing units. The option to take title to a condominium was characterized as "appendage" to this central purpose and not determinative of the transaction's essential nature. The Court reasoned that the Act was intended to provide protection to purchasers of new homes and noted the lack of harmony between this protection and the nature of the transactions before it. In

result, the Ontario Court of Appeal concluded that the agreements were not agreements to sell a home within the meaning of the Act. In effect, the Court of Appeal reined in and restricted the letter of the statute by interpreting it in a manner which was consistent with its objective of protecting new home purchasers and owners. However, the decision of the Court of Appeal does not stand for the converse proposition that where a transaction involves a consumer and/or new home the protection afforded by the Act automatically applies. The statutory requirement of "an agreement to sell" is still a necessary prerequisite to any entitlement against the guarantee fund.

We also note that in Carvalho, the Tribunal concluded that the agreement was scheme devised to avoid the Act and would allow the builder "to collect hundreds of thousands of dollars, if not millions of dollars in reservation fees without having to post any security with the Program. This would obviously save [the builder] considerable funds while being able to operate on the cash flow provided by unsuspecting prospective purchasers." We take notice of the fact that reservation agreements are sometimes used by developers for a legitimate purpose, namely to test the market for the level of serious interest in the proposed project that exists among prospective purchasers. Once the developer is committed to proceeding with a project, it would be foolhardy and impractical to proceed on the basis of reservation agreements alone as these would leave the prospective purchasers free to walk away from the project at any time. Furthermore, it would be difficult if not impossible for a developer to obtain institutional construction financing for the project on the basis of reservation agreements alone.

Although reservation agreements can clearly be used for a legitimate purpose, it is nonetheless clear from the case before us, as well as the case before the Tribunal in Carvalho, that reservation agreements are susceptible to misuse and abuse by the prospective vendors collecting reservation fees and present a potentially costly pitfall for unsuspecting and unsophisticated consumers who may not be cognizant of the difference between a reservation agreement and an agreement of purchase and sale. While these may be consumers in need of protection, no such statutory protection exists at present.

One further issue deserves comment and that is the matter of the release executed by Mrs. McGivern. If the release is legally binding upon Mrs. McGivern, then she would no longer have a cause of action in damages against Preston and would not be able to make a claim under section 14(1)(a) of the Act. However, since Mrs. McGivern did not in fact receive the full consideration referred to in the release, we are, therefore, of the view that the release is unenforceable. Nonetheless, in view of our decision on

the main issue, our finding as to the release does not effect the result insofar as the claim against the Program is concerned. Of course, Mrs. McGivern's entitlement to relief from Preston is not a matter that the Tribunal has jurisdiction to deal with, however it would appear that she has a good claim against Preston which she is entitled to pursue in the courts. Accordingly, the Applicant's claim herein is dismissed.

MR. AND MRS. K. MEHTA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
GERRY BEECH, Member
LOUIS A. RICE, Member

APPEARANCES:

K. MEHTA, appearing on their behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 2 October 1992

Toronto

REASONS FOR DECISION AND ORDER

There is only one issue before the Tribunal and that is whether or not there is a defect in the installation of the patio door which permits access to flies and insects.

A conciliation was conducted at the home on March 7, 1990 and the following finding was made by the conciliator Mr. Bruce Stephens.

COMPLAINT Screen to patio door is not proper.

OBSERVATION The concerns of Mr. Mehta are that flies are being allowed through the screen door of the kitchen eating areas patio doors. Mr. Mehta also advised that the builder has taken some remedial work to the screen door.

COMMENT As there was no defect evident in the installation of the screen door the Program is unable to assist in this complaint.

The builder addressed the complaint, but on March 28 the owner again wrote to the Program that the situation had not been corrected to his satisfaction. After two more complaints, the Program's inspector Richard Johnston attended at the premises and inspected the door. His report is reflected in the Program's

letter of May 17 to Mr. Mehta:

Following our telephone discussion on May 15, 1990 Mr. Johnston attended at your home on May 17, 1990 to conduct a reinspection. Mr. Johnston advises that there are no defects in material, workmanship or design of the patio sliding doors or the screen door.

It is therefore the opinion of this office that this item is not warranted and your builder is not in breach of his obligations under the Ontario New Home Warranties Plan Act.

A final decision was made by the Program and conveyed to Mr. Mehta by letter dated June 1, 1990:

During the reinspection on May 16, 1990 you expressed concerns about insects entering your residence through the patio door assembly. This issue was reviewed by the Program's representative's; Mr. Johnston and myself, and it appears that the only time that insects could enter your home is during the normal operation of opening and closing the screen door. We observed that when the screen door was in the closed position the vertical rubber strip on the screen door came in contact with the centre frame assembly of the door.

Therefore, it is our opinion that the function of the patio screen door is not contrary to the aforementioned section of the Warranty Plan Act.

Mr. Mehta, however, insisted that the Program continue to attempt to correct the problem and in correspondence dated June 13 pointed out that he had discussed the matter with a home inspection company and was advised that the only time a screen can be effective is when it is placed on the outside of the door and not in between as was the subject installation.

Bruce Stephens, the Program's conciliator, in his evidence stated that the operation and function of the patio door met the requirements of the Ontario Building Code and there was no defect in workmanship or materials. He also said that it would

make no difference whether the screen was on the outside or in between the glass doors.

Stephens returned to the premises on September 23, 1992 and with the manufacturer's representative who had installed some weatherstripping on the door found no defect at that time.

In this matter, we are dealing with a complaint under section 13(1)(a) of the Ontario New Home Warranties Plan Act. The section contemplates construction in a workmanlike manner free from defects in material. We can find no evidence before us of any defects in material or workmanship. The home is certainly habitable and there is no evidence of any infraction of the Ontario Building Code. Under the circumstances, we must disallow this claim.

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 813

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding

APPEARANCES:

MICHAEL A. SPEARS, representing Metropolitan Toronto
Condominium Corporation No. 813

JACK B. BERKOW and ELIZABETH J. WOLFE,
representing 675550 Ontario Ltd.

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF 15 June, 8, 9, 10 December 1992

HEARING: 8 January 1993

Toronto

REASONS FOR DECISION AND ORDER

In 1987 and 1988, 675550 Ontario Ltd. ("the builder") constructed a 270-unit known as "The Gatsby" at 88 Alton Towers Circle in Scarborough. Occupancy of units began in December 1, 1988 and owners noticed later that month that the surface coating on the garage floor was deteriorating and breaking off in certain cornering and drive path locations. The project was registered as Metropolitan Toronto Condominium Corporation No. 813 ("the Corporation") on April 5, 1989.

The Corporation has appealed to the Tribunal from a decision of the Ontario New Home Warranty Program ("the Program") of February 28, 1991. A conciliation report of the same date set out the one issue which is now before the Tribunal and the history of the situation as follows:

CONCERN: A defective Elastodek traffic topping has been installed. The failed sections should be removed and replaced with Kelmar traffic topping as originally specified.

OBSERVATION
AND BACKGROUND
INFORMATION:

The Ontario New Home Warranty Program has completed a detailed review of this concern. Our review has included all known engineer reports and related documents, in addition to a number of discussions.

Kelmar traffic topping was specified by the architect E.I. Richmond Architects Inc. The specified topping was changed to Elastodek traffic topping.

The MTCC 813 identified in their technical audit that a deficiency existed in the traffic topping.

The vendor advised on April 12/90 that they have retained the services of Medhurst, Hogg, Subottka and Associates to prepare specifications and tender for traffic topping repairs. Bids to be received and finalized by May 4/90. Repairs to the underground garage are estimated to take 2 months.

MTCC 813 advised vendor that they will require acceptance of repair method and materials by their consultant Morrison Hershfield.

Morrison Hershfield received the requested information and rejected the method of repair that was proposed.

One of the main reasons for the rejection of this repair was that the new material was not compatible to the existing material.

At pre-conciliation meeting on June 12/90 the Vendor/Builder advised that a tender call has been requested for the repair. The Vendor/Builder advised that the product manufacturer was conducting tests to address the compatibility concern.

The Condominium corporation still rejected the proposed repair and requested removal of Elastodek traffic topping, and that total Kelmar topping be installed.

The Vendor/Builder asks the Board for approval to proceed with awarding of Contract to get repairs done.

On July 10/90, MTCC 813, through their Solicitor, advised the Vendor that they are not accepting Elastodek topping as it is their information that the existing material cannot be repaired.

Vendor advises that they are still prepared to do repairs.

On October 11/90, at a pre-conciliation, Condo Board submitted a new test report indicating that the existing topping material failed to meet the A.S.T.M. standard D3633 specification.

Vendor requests 2 weeks to examine report. The request was granted.

Vendor advised that the test report is invalid as it does not apply to traffic topping in garages, but is designed for topping on highway bridges.

Vendor states that Bakelite, the material manufacturer, is ready to perform the repair work and warranty all repairs for 2 years and to extend the warranty to 2 years on the remainder of the topping.

MTCC 813 lawyer requests replacement of traffic topping, because Elastodek is not an acceptable waterproofing system.

Warranty Program issued a statement that based on the facts to date, it was our feeling that Elastodek is an acceptable material, and that our findings were that repairs could be properly completed.

The Vendor insists they are ready to repair as stated in their letter of November 5, 1990.

The Condominium corporation advised all parties that they had issued a tender call to remove the existing topping and to install a Kelmar topping material.

The Warranty Program conducted a inspection of the complete garage area and observed the Elastodek material being removed. This inspection was carried out within the time frame provided by the Condominium corporation. It is the Program's information that the vendor or their consultants, did not meet the inspection deadlines and later access was not allowed. We further understand that the Vendor/Builder did not obtain any removed samples for further testing.

Based on our review of all of the information on file, the correspondence and reports and our site inspection, the Ontario New Home Warranty Program agrees that there were defects with the Elastodek material that would

require extensive repairs. However, it was noted that the vendor and their sub trade was willing to complete these repairs and extend the warranty for a full two years.

It was further noted that there did not appear to be a full agreement between all consultants as to how this material was to be tested or what standard for testing should be used. From the information available it is the feeling of the Ontario New Home Warranty Program that the installed Elastodek material was a material designed to be used for traffic topping of parking garages. It was also our feeling that the manufacturer (Bakelite) had properly informed all parties that the proposed repair material was compatible with the Elastodek material and acceptable for the type of repair.

Based on the facts that this project doesn't qualify for substitution warranty coverage, it is the finding of this meeting, that the concern of MTCC 813 in regard to traffic topping is a contractual matter between the Vendor/Builder and the Condominium Corporation.

The Program does not require any further action on this item.

It was reported in the two additional engineer reports that the existing Elastodek material had failed the test and their recommendation was to replace the complete area.

The Condominium corporation did have the Elastodek topping removed and replaced with a Kelmar traffic topping material in November and December 1990.

Those present at the conciliation meeting of February 1, 1990 were:

Dale Kerr of Morrison Hershfield Ltd.,
representing MTCC 813

Gerry Genge of Morrison Hershfield Ltd.

Kathleen Moyser - Property Manager for MTCC
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Peter Leong - Medhurst, Hogg, Sobottka, Leong
and Associates Ltd., representing 675550
Ontario Ltd., the Vendor/Builder

Donald Clarke - Fogler, Rubinoff, Barristers & Solicitors, representing 675550 Ontario Ltd., the Vendor/Builder

Edie Glazer, representing 675550 Ontario Ltd., the Vendor/Builder

Rose Von Essen, representing 675550 Ontario Ltd., the Vendor/Builder

Michael Spears of Pacey, Deacon, Spears & Fedson, Barristers and Solicitors, representing MTCC 813

Jake Jekabsons - conciliator representing Ontario New Home Warranty Program

Robert Rosset - conciliator representing Ontario New Home Warranty Program

The decision letter stated:

In accordance to your request for the Ontario New Home Warranty Program to conduct a conciliation at the above project, please find enclosed our conciliation report.

You will recall that an agreement between MTCC 813 and the vendor was reached at a prior conciliation meeting (copy of that agreement has been sent to all parties) on the water leakage concern.

The enclosed conciliation report deals with the Traffic topping issue.

I have reviewed the file information, inspection reports and had a number of discussions with Mr. Jekabsons re the facts on this concern.

This conciliation of the traffic topping issue is a proposed claim under Section 14-1-(b) of the Ontario New Home Warranties Plan Act.

The reasons outlined in the conciliation report are a fair assessment of the facts that have been made known to the Ontario

New Home Warranty Program by all parties.

The conciliation report also makes note of the Substitution Warranty Section coverage.

In conclusion, it is the decision of the Ontario New Home Warranty Program that the traffic topping replacement is a contractual matter between the Vendor/Builder and MTCC 813 (owner).

The correct name of the specified traffic topping is "Kelmar T.E. System" and it will be referred to throughout this decision as "Kelmar".

In his overview of this claim, counsel for the Corporation advanced the claim under Section 15 of the Ontario New Home Warranties Plan Act ("the Act") which states:

15. For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description.

He said that by Regulation 726, the garage area is a common element and a claim there must be advanced by the Corporation with the warranty period beginning on April 5, 1989. He stated that the Corporation had proceeded to remove all of the Elastodek topping from the garage deck and have Kelmar traffic topping installed in November and December 1990 at a cost of \$175,618.50 (Exhibit 18, page 3). In addition, the cost of the consulting engineers' report was \$25,864.90 (Exhibit 17, tab 54). Therefore, the claim for a breach of warranty under Section 13(1)(a)(i) of the Act is against the Program for \$201,483.40.

That reference is:

13.-(1) Every vendor of a home warrants
to the owner

(a) that the home

(i) is constructed in a workmanlike
manner and is free from defects in
material,

The Corporation claims to recover damages for the breach of this warranty pursuant to Section 14(1)(b) which states:

14.-(1) Where

.....
 (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

.....
 the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Counsel for the Corporation agreed that the full repair work was done some two months before the conciliation meeting of February 1, 1991, and that the Corporation seeks now to be reimbursed for the monies which were spent.

Stratos Tsompanellis ("Tsompanellis") became a unit owner in the Corporation on December 1, 1988, and served as Secretary and General-Manager on the Board of Directors from July 1989 until his resignation on June 3, 1992, when he moved to Ottawa. He described the buildings on the site and the common element scissor garage of 2 levels which he said was to have a waterproof membrane on the garage floor. He remembered the damage to the traffic surface in December 1988 and recalled that Morrison Hershfield was retained as consulting engineers to do a technical audit of the deficiencies in the building and that they advised that the Elastodek topping was inadequate, had failed, and should be replaced with Kelmar.

He was familiar with the letter from the Corporation's solicitors which was sent to the builder on October 30, 1990 with a copy to the Program on the instructions of the Board of Directors of the Corporation. That letter stated:

We are the new solicitors for Metropolitan Toronto Condominium Corporation No. 813.

As a result of a review of extensive correspondence to date and engineering reports, it is clear that there has been much procrastination and disagreement as to the means of repair of numerous construction deficiencies in the property and buildings at 88 Alton Towers Circle, forming Metropolitan Toronto Condominium Plan No. 813.

The particular concern of the condominium corporation's consulting engineers is the deterioration of the underground garage suspended slab that would occur during the winter due to salt and water being transported in on motor vehicles, which would penetrate the concrete, giving rise to serious deterioration problems such as delamination.

We note that there has been some debate between the current licensed manufacturer of the Elastodek topping that was installed, and the consulting engineers who have found the product deficient in numerous respects.

We presume that you have noticed the most recent correspondence addressed to you dated October 22, 1990 from the Vice-President of sales of Bakelite Thermosets Limited offering to repair exposed areas and warrant the deck area for two years. We now enclose for your information a copy of a reply to the said correspondence dated October 29, 1990 confirming for the third or fourth time that the Elastodek is unsatisfactory and that the originally specified Kelmar waterproofing system must be applied.

This firm acts on behalf of numerous condominium corporations, and we have advised our clients that they have no alternative but to take immediate remedial procedures, having been advised that by consulting professionals that the same is necessary to avoid substantial deterioration and damage. In fact, if adequate remedial steps are not taken by the condominium corporation immediately, then any owner would have a right of action against the condominium corporation for ensuing damages or deterioration.

Accordingly, the condominium corporation can delay no longer its demand that the originally specified Kelmar waterproofing system be immediately applied. We accordingly hereby notify you that if the

declarant, the Am-Me Group had not confirmed by written agreement that it will immediately install the Kelmar System, then the condominium corporation will have no alternative but to seek immediate tenders to perform the work and hold the declarant fully liable for the costs of performance of the work.

This letter will serve as formal notice to you that interest on all amounts expended by the corporation in this regard will be claimed from you from the date of such expenditures in accordance with the Ontario Courts of Justice Act and the Rules of Procedure.

The corporation is prepared to delay seeking tenders until 12:00 p.m. noon, Tuesday November 6, 1990 to provide you with one week within which to consider your action in response to this letter.

We are also advised that an engineering report was prepared for the Ontario New Home Warranty Program by your consulting engineers during and after construction to satisfy Bulletin 19 of the Ontario New Home Warranty Program. This report was prepared with a view to protecting the interests of purchasers of new homes and the declarant in its capacity as a Trustee or Fiduciary on behalf of the purchasers. On their behalf we require a copy of the said report to be delivered to the corporation forthwith.

Tsompanellis said that three tenders were obtained to do the work and the lowest was chosen with the work done in December 1990 and January 1991 at a total cost of \$201,483.40 which has been paid by the Corporation.

On cross-examination by counsel for the builder, Tsompanellis agreed that most of the correspondence in this matter had been received by him and that he had been the spokesman for the Board of Directors. He confirmed that the reference in the extract from the technical audit (Exhibit 17, tab 1) noted page 1-41 reference 2.2.1 Visual Inspection that:

Debonding of the Elastodek system was observed, especially at the garage entrance. The Elastodek system was brittle. This is a construction deficiency.

Tsompanellis agreed that the audit did not call for the replacing the Elastodek.

Tsompanellis said that after several meetings in May 1990 with staff of the builder, there was as yet no decision to fix or replace the deck topping.

Tsompanellis said that he thought the builder was uncooperative, stalling and misleading the Corporation and that a lawsuit would likely be needed to force the builder to do any repairs. He agreed that only six weeks passed after the review meeting of October 11, 1990 at the Program office until the Corporation had the repair work done. The minutes of that meeting (Exhibit 17, tab 23) refer to this issue as follows:

Underground Garage, Water Proofing System.

1. Mr. Genge presented his report on the Elastodek Topping.

Mr. Genge expressed his concern that the Elastodek should be replaced before this winter. Report attached.

Mrs. Von Essen replied the Vendor was not in receipt of this report and would need time to have the contractors to reply.

Mrs. Von Essen also stated the Topping is still under warranty and the Builder is ready to have same patched.

Mr. Genge replied that the entire Topping has to be removed. It cannot be "patched up".

Mr. Jekabson requested the Builder to provide an answer to Condominium Corporation by October 25, 1990.

Mr. Genge again stated his concern that the Topping should be replaced before this winter.

Tsompanellis saw the repair work as an emergency since the Corporation's consultant engineers also thought this. He said he denied Bakelite's request to inspect the site before repairs were done since a week had been granted, and the request was one day late. He thought that the request was a further stalling tactic. He agreed that the work did not begin until December and was done in stages so that Bakelite's representative could have attended readily during the three months.

On cross-examination by counsel for the Program, Tsompanellis agreed that the one week deadline was really an ultimatum to the builder and that the corporation wanted a full replacement of the Elastodek with the Kelmar topping. Tsompanellis agreed that the builder never denied that a problem existed with the Elastodek surface topping.

He agreed that repairs had been offered and that if they were not successful, under the longer warranty a claim could then have been made to the Program to ensure that satisfactory repairs were then done.

He further agreed that he believed the repairs as suggested by the builder were not enough, that the builder was not permitted to enter the garage and attempt those repairs and that he relied on his engineers to require a full replacement of the deck topping.

Gerald Genge ("Genge") is a Principal and Vice-President of Morrison Hershfield Limited. He is a Professional Engineer and directed the review of this building, making his report to Tsompanellis as of May 23, 1991 (Exhibit 18).

He is qualified in four Provinces and has given expert evidence on many occasions concerning building performance problems. His company was retained in early November 1989 to do a technical audit of the building and reported on March 16, 1990. He stated that the Kelmar product is mentioned in the building specifications and is noted on the construction drawings for the garage. He said that Kelmar is a brand name for a thin cold-applied neoprene waterproof membrane which has a wearing course of grit then applied on top.

He said that Elastodek is a one-layer 1/8" product poured hot on the floor slab with a broadcasting of sand later to make traction, and there is no separate waterproof membrane used here. He was concerned to see deterioration and flaking at the driveway entrance to the garage and believes that there is not a flexibility of low temperatures for Elastodek, so that he would not recommend using it.

He knows that the manufacturer of Elastodek was bought out by Bakelite and believes their own products are now marketed so that Elastodek is not in current usage.

Genge used photographs (Exhibit 21-23) to show how the area of wear had grown over a year and said that the underlying cement floor would then be liable to corrosion from salty water and snow brought into the garage by vehicles.

He said that the first steps of future serious corrosion problems were evident in early 1990 and that Bakelite's offer to repair with compatible materials and guarantee the work for two further years was not good enough for him. He believes that an immediate replacement with Kelmar was the solution to avoid further corrosive damage from salt entry into the garage slab.

Genge said that Elastodek is a hot applied bituminous material which is not a waterproofing system while Kelmar is applied cold and is a waterproof system. Therefore, he would not see the first as a substitute for the second. From photographs (Exhibits 24 and 25), Genge said that a pile of debris and the surface of the deck showed that the Elastodek had debonded from the surface in brittle pieces.

Genge said that samples of the delaminated material were studied and that dragging a chain to learn of hollow sounding areas over 5% of the area, showed 1/3 of 1% of that area to have delamination (Exhibit 17, tab 20, p.2). In addition, cracking, pinholes and bubbling was noted with extensive debonding at the front entrance to the garage. He noted that many small areas also needed some concrete repair to a total of 750 square feet.

In September 1990, Genge visited a duplicate building of "the Gatsby" which is "Club 1" or Peel Condominium Corporation #327 at 300 Webb Drive in Mississauga. Built at the same time from the same plans, that project also had Elastodek used in place of Kelmar. He noted that a hot mastic waterproofing system had been applied and that this was in reasonable condition with some wear and cracks showing up after a year of use. This is a less expensive thicker and, therefore, a heavier application than Kelmar, and Genge stated that the maintenance costs over time would be similar.

On cross-examination by counsel for the builder, Genge agreed that the mastic product could be applied over the remaining Elastodek surface, but he had concerns as to performance since debonding could occur under that overall coating. He said that patching was considered using Kelmar but his conclusion was to remove all of the Elastodek and replace the whole 50,000 square foot surface, where labour costs would be assumed by the general

contractor of the project and materials would be supplied either free or at low cost.

Genge said that corrosion of parking garage floors was a common problem in the 1980's, so that various covering toppings were developed by several suppliers. The Ontario Building Code calls for protection against corrosion since 1989, he said. Genge confirmed that samples of the delaminated material could have been taken since the work proceeded in stages for the convenience of the unit owners and tenants. He said that the Corporation went ahead to do the work without the Program's agreement, since the need for repairs was urgent.

Genge agreed that he had made no notes after his visual inspection of the garage and that the only test was the chain drag one. He concluded that Kelmar was specified and without proof of any substitution having been agreed to, he wanted what was specified for his client. Genge said that the decision to replace on an urgent basis was made in the summertime since some corrosion was evident in smaller areas after two winters, and once salt enters a concrete slab the result cannot be easily reversed or repaired. He was uncertain if the results from the free repair and two year guarantee would be satisfactory.

Associate counsel for the builder noted that the Program agreed to arrange a conciliation for this complaint by letter of November 23, 1990 (Exhibit 17, tab 37) and when the offer was accepted by the Corporation's counsel by letter of December 5, 1990 (Exhibit 15, tab 54), the repairs were already underway. These repairs were completed before the conciliation inspection of February 1, 1991, so that no remedial work could be done, and there was nothing left to conciliate. She further noted that the Act sets out the conciliation process in Section 17, while Section 5(3) of Regulation 726 states:

5(3) Within fourteen days of the commencement of the conciliation proceedings, the Corporation shall provide the vendor and the owner with a decision in writing setting forth such remedial work, if any, as may be required to settle the dispute.

She said that no remedial work could have been done after the conciliation report was completed and a decision letter was eventually issued.

In response, counsel for the Corporation said that this is simply an appeal from the Program's decision and that the performance of remedial work only quantified the damages.

He said that greater costs could have been incurred by delay and more corrosion.

Rose Von Essen is a property manager with ten years experience and operated "the Gatsby" from 1987 to December 1989. She scheduled the moving-in of new owners of the 279 units and said that the building had a mid-range price of \$100,000 per unit. She represented the builder at the time of the technical audit of deficiencies and worked with Peter Leong, an engineer with the consultant firm of Medhurst Hogg. She did the same tasks for the "Club 1" project in Mississauga.

She recalled that an employee of the architects for the building had approved the Elastodek substitution. She said that she prepared the minutes of the meeting on May 9, 1990 (Exhibit 17, tab 12) which state:

Mr. Genge expressed his concern that the spec's did not cover the traffic topping and columns. Mr. Leong confirmed that the traffic topping (waterproofing) was not addressed in the specifications, but would be later added as an addendum. Mr. Leong reviewed his difficulties in obtaining a commitment to the warranty from the manufacturer of the material and was not satisfied with the remedy proposed by the manufacturer. He wanted more time to work out a more acceptable alternative. Ms. von Essen and Ms. Glazer endorsed Mr. Leong's position on the traffic topping, and all agreed that Medhurst would provide a solution the week of May 21, 1990.

Ms. von Essen undertook to correspond with the manufacturer, Bakelite, and the general contractor, Bradsil, to determine their position.

She said that this was the first discussion of this issue, and from the minutes of a further meeting of May 23, 1990 (Exhibit 15, tab 20), she recalled that Leong would deal directly with Bakelite as to the repairs, that the warranty would be sent on to him by Tsompanellis and that bidding to do the repairs would lead to the work being done in early July.

The requirement to replace the topping was set out in the letter to her of July 10, 1990 by the Corporation's lawyer. She said that there was no further discussion of any repair procedures, as the Corporation wanted Kelmar.

The new solicitors for the Corporation gave the builder one week to do the repairs by letter of October 30, 1990, she said.

Her reply of November 5, 1990 (Exhibit 17, tab 30) states:

We are in receipt of your letter, delivered by Courier to our office October 30th, 1990, and share with the Corporation's consulting engineer their concern of the delay in the start of the remedial work of the Elastodek topping in the underground garage.

In June of this year, both the manufacturer and installer gave written assurances to honour their warranty and to perform all remedial work that is set forth in their contractual warranty. In addition, they proposed an extension of their warranty.

It is our opinion that the additional warranty period will provide sufficient time to determine the reliance on the opinions of the opposing consulting engineers. Having the remedial work done does not preclude the Corporation from any option that may be available to them should the work prove unsatisfactory.

Naturally, we are relying on our engineering study done in June 1990 and the Corporation is relying on their engineering study, delivered to us at a pre-conciliation meeting two weeks ago.

It should be noted that the manufacturer and installer were and are willing, able and prepared to start the remedial work under their warranty terms from June of this year and have been denied the opportunity to remedy.

She confirmed that the "Club 1" project was organized by the same developer using the same builder and architect. Although construction began eight months earlier, the project was finished when "the Gatsby" was. She knew that repairs to the Elastodek topping in "Club 1" were made with patching and a sealant over the whole area in early 1991 and she says that the results appear to be

satisfactory. She understands that the cost of those repairs was divided four ways by the developer, the general contractor, the installer, and the supplier Bakelite. She stated that these repairs were done at a lower cost since Bakelite supplied some materials without charge and others at cost, and the general contractor provided labour at cost.

On cross-examination, she said that the letter to her of July 10, 1990 came as a surprise since she thought a consensus was developing as to the repairs that were to be done.

Peter Leong is an engineer and since 1978 has been involved in the design and construction of parking garages while employed for the past seven years by Medhurst Hogg and Associates Ltd. He was part of the evaluation process of the technical audit deficiencies and said he would recommend repairs as required without concern of cost. He visited the garage on April 26, 1990 and noticed delamination particularly at the entry from the ramp to the garage floor. He confirmed the accuracy of the minutes of the meetings of May 9 and 23, 1990. Leong suggested repair as opposed to the replacement of the Elastodek using Bakelite's 390-15 product. He was also present at the pre-conciliation meeting of October 11, 1990 and found Bakelite willing to do repairs and give a further two-year guarantee.

Leong said the 1990 standards for traffic topping and corrosion avoidance in the Ontario Building Code incorporate a CSA standard as a minimum. He said that Bakelite was prepared in April 1990 to do the necessary repairs and that cost was not a factor. He finds the chain drag test not to be a serious basis for any decision and said that another test used was not on fresh material as it should have been. He then referred to two standard tests which could have been used and said that a visual inspection of the underpart of the slab would have helped determine if there was any corrosion or any leaking or cracking. He said that he would not recommend full replacement of the Elastodek without clear useful test results and that access was denied to obtain any samples. He has visited the "Club 1" project recently and says that the traffic topping with the mastic wear course appears to be satisfactory.

On cross-examination, Leong said that he had looked at the under surface of the garage concrete slab and had not seen any leaks, stains or cracks. He reviewed the process of corrosion of steel reinforcing rods and the delamination of concrete which can occur from salty water entering an area. This is progressive, he said, but he found no risk in Bakelite's repair offer since tests would be done, maintenance and drainage would occur and this was not an urgent situation for him. Therefore, a third winter of wear would not be a risk and all choices for reasonable repair were not considered, in his opinion.

Scott Wylie is a technical representative for Bakelite and was familiar with this complaint from his visit to see the delamination in January 1990, through the correspondence on this issue, to the attempt to visit the garage a day after the one week ultimatum was given. He confirmed the further two-year warranty for labour and material which Bakelite offered upon the repairs being completed.

Salvatore Vitello is the managing partner of E.I. Richmond Architects, who designed this project. He has reviewed the file and spoke with the former employee who had in turn informed Rose von Essen that the substitution had been acceptable. Vitello is informed that this was discussed at a meeting on site, and that the proper procedure to record and approve such a change was not followed. Vitello agreed that Kelmar was specified on the plans and was a new product then, but is now widely used.

Counsel for the Program presented Jake Jekabsons as his only witness. Jekabsons has been a technical representative for condominium construction for three and one-half years and was with C.M.H.C. in that duty for thirteen earlier years. He is familiar with the National Building Code and the Ontario Building Code, and often becomes involved with sorting out problems that a technical audit raises, as part of a pre-conciliation process for these larger projects.

He said that at a pre-conciliation meeting, he is the chairperson, and without a report or minutes, he attempts to sort out the differences between the vendor/builder and the Condominium Corporation representatives. The Technical Audit for this project was completed on March 6, 1990, he said, and the relevant portion with respect to this issue is found in Exhibit 17, tab 1.

Jekabsons is the author of the conciliation report of February 28, 1991 set out earlier, with the list of those attending on February 1. He said that there were four earlier meetings on other items, and that he reviewed the various reports on this complaint presented by each party. Jekabsons said that the builder had engaged Medhurst Hogg to prepare specifications for repairs with bids sought as of May 4, 1990 and the Corporation's consultants Morrison Hershfield rejected the garage topping repair procedure. At the pre-conciliation stage, he said that the Program tries to guide the parties to a solution of their differences. While the Corporation wanted a replacement of this topping, Jekabsons said that the vendor/builder was always ready to repair the areas with a two year guarantee for the entire surface.

Jekabsons said that the Bakelite undertaking was significant to the Program as this showed confidence in the repairs which should be satisfactory in the Program's view.

Since Elastodek is a designed product for use in parking garages, Jekabsons said that the use was an acceptable change from the specifications and repairs could be suitably made. He made three visits to the garage and found areas which sounded hollow due to debonding for perhaps a total of 500 square feet which is 1% of the slab surface. This project does not qualify for any substitution warranty since it was completed before June 30, 1988, he noted.

A full replacement was done at the end of 1990, and while some repairs were needed, the action of the Corporation prevented the Program from doing a conciliation and from making an order for appropriate work, he said.

Jekabsons said that while there may usually be up to 100 items to work through at a pre-conciliation, here there were 712. The Corporation did not want this problem only repaired, but in his opinion the builder should be permitted to do the repairs and provide a guarantee.

In conclusion, counsel for the Corporation said that the concerns expressed by his client's engineer on May 3, 1990 were based on a lack of guarantee at that time and on the lack of any tests which would assume that repairs would be satisfactory. He said that information was not readily forthcoming and that the Corporation acted to protect its property from damages. He found that no reliance should be placed on the refusal of access in November 1990 as six months had passed during which samples could have been obtained.

He agreed that this was not a complaint which qualified to be an issue of substitution as it occurred before June 30, 1988. He rejected the view that Elastodek was designed as a product for use in parking garages since there was failure of this product under the tests done for low temperature flexibility, crack bridging capability and water vapour permeance. In his opinion, the builder did not substitute one like product for another as Kelmar is waterproof while Elastodek is not.

Counsel for the builder said that his client was always ready and willing to repair the problem with a two year-guarantee, but that the Corporation refused this approach. Since the Corporation would accept nothing less than a full replacement as demanded, he said that \$200,000 was spent based only upon a visual inspection. In his view, the parties to the issue were the developer builder, the construction contractor and the architect who all agreed to use the Elastodek, and that the Corporation had no part in that decision. He submits that as there is no standard for such work, and very little debonding has occurred, the Corporation has acted hastily and without reason to overspend and

then expects the builder to pay this account when there was never the opportunity to do the expected repairs.

He said that the extension of the warranty to two years was reasonable since one year for accepted repairs is the Program's usual standard; and he said that the Corporation's position of a five-year guarantee and a 100% performance bond was extreme. He said that the letter of November 5, 1990 by Rose Von Essen sets out a reasonable approach and a commitment to resolve the problem. Repairs would have been a much cheaper way to resolve this claim as materials and labour would be provided either freely or at basic cost, and the cost of them would have been divided as it was for using a different material at "Club 1".

Counsel for the Program agrees with the position advanced by counsel for the builder and agrees further that this is not a substitution issue. He stands by the offer to do repairs and the Program's conciliation report which came after the work was done so that no remedy could be required from the willing builder and the supplier Bakelite.

The decision to do the full work was solely that of the Corporation he said, and those actions took the Corporation out of the protection and procedures of the Act in his view. He said that the conciliation procedure requires the opportunity for repair, otherwise the owner can do whatever work is wished and expect the bill will be paid by the Program. The Program is a guarantor of warranty which the builder gives and here there was no chance to do any work. The proposed repair was reasonable for the Program to rely upon, and there would have been no injury to the Corporation if repairs failed and the guarantee was called upon after a further decision by the Program. He said that any repairs could then have been done although no doubt at some greater expense, but the builder had that obligation and the Corporation would be protected.

The evidence presented to the Tribunal has been considered. After receiving legal and engineering advice, the Corporation went ahead to arrange substantial and expensive repairs to the garage floor deck. This was done while the conciliation was being arranged and the work was, in fact, completed before the conciliation inspection took place. The actions of the Corporation have prevented the Program from carrying on its duties under Section 17 of the Act and Section 5(3) of Regulation 726.

In order to obtain the protection of the Act, the Corporation was obliged to follow the statutory procedures. There was no urgency in this complaint that could not have been met with funds if necessary to resolve it.

The Corporation seeks to provide an account as proof of what had to be done. That is not acceptable to the Tribunal, as there is no proof that the expected and accepted repair work would have been unsatisfactory. The guarantee offered would have kept any rights of the Corporation alive for a further conciliation report if necessary. Because of the action of the Corporation, the Program cannot order "such remedial work, if any, as may be required to settle the dispute.

Accordingly, by virtue of the authority vested in the Commercial Registration Appeal Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

The above decision was appealed to
Divisional Court. Its decision
is at 27 C.R.A.T. 1043.

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 743

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

ANTON HART, agent for the Applicants

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 18, 19 January 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant Metropolitan Toronto Condominium Corporation #743 from a decision of the Ontario New Home Warranty Program communicated to it by a letter dated April 2, 1992 which reads as follows:

Further to your letter of March 26, 1992, I would like to advise you that the Warranty Program cannot assist you regarding your truss uplift complaint.

Please note that truss uplift is not warrantable, however, some of the causes which contribute to truss uplift are warrantable, if reported in the first year.

In your case, it has been 4 years since the Condominium was registered. The prime cause of your truss uplift is the lack of proper vapour barrier and this item is only warrantable for a period of one year. As you are aware, this warranty expired back on August 17, 1988.

Again, I'm sorry to say that the Warranty Program cannot assist you in this matter.

We are concerned here with a condominium development of eighteen apartment units built on three floors and having municipal addresses of 94, 96 and 98 Trinity Street in Toronto. The condominium was registered August 17, 1987 and the times limited for making claims for defects began to run on that date. There were quite a number of claims for defects made by individual unit owners, but we are concerned at this hearing only with claims made on behalf of the condominium corporation itself for defects in common elements pursuant to Section 15 of the Ontario New Home Warranties Plan Act.

On January 18, 1988, a letter was sent stated to be "On behalf of the Board of Directors of MTCC 743" and signed by two members thereof to the builder of the building with a copy to "HUDAC". This letter reads as follows:

It has been nearly ten (10) months since the first residents have moved into the above stated properties. We are writing to you now to bring you up to date on the building defects that have surfaced.

The enclosed questionnaires submitted by the residents indicate serious defects in many of the units and in the stairwells. Several of the owners have questioned whether vapour barriers were properly installed in the roof and around the chimneys, which conceivably could have created the wet and fallen plaster in the top level units, and wall cracks throughout the building.

We request that you visit and examine the condominium at some mutually convenient time by January 31/1988.

(We would like to organize as many owners as possible to let you into their units, so the weekend might be the most practical time). After your visit, we would then like to hear what your company would propose to do to rectify the defects.

Most of the defects in the walls and ceilings have become apparent in the last two months; however, as the questionnaires indicate minor defects particularly doors and windows have been obvious since initial occupancy.

These minor defects were listed on the HUDAC Certificates of Completion and Possession in mid April, and many owners have waited patiently for repairs.

We understand that several owners have contacted Sam Richmond and that he has attempted to make repairs, but the Board of Directors felt it best that the condominium owners now approach you as a group. This will enable you to coordinate repairs efficiently, and deal with what may in fact be structural defects.

The Program responded by a letter of February 8, 1988 requesting copies of certain documents and further information, and the condominium corporation replied on June 13, 1988 with the following:

This letter is a request by MTCC 743 for assistance from O.N.H.W.P., to get repaired the following defects in the common areas of our building:

- 1) excessive plaster cracking in stairwells
- 2) bulging of the walls in stairways
- 3) window and door frame shifting on the top floor preventing every door and window from closing and/or locking properly.

We have requested the builder (letter enclosed) to rectify these problems but have received only a few phone calls and no action.

Please advise us of what you are able to do to help in this matter.

As a result of the foregoing and further correspondence and telephone conversations between the parties, a meeting was held at the premises on October 27, 1989 at which were present three officials from the Program, ten of the eighteen unit owners and two of the principals in the builder/vendor company. We have a copy of the Minutes of the meeting as prepared on behalf of the condominium corporation and the first numbered item in these Minutes reads:

- 1) HUDAC was notified in writing by the board within the 1 year limit of three (3) deficiencies in the common elements
 - a) Cracks around door frames in stairwells
 - b) Bulging walls in stairwells
 - c) Improper fit of windows and doors

The evidence established that, following this meeting the builder had a contractor or contractors attend at the premises and do work upon the first and second numbered of these problems and that they satisfactorily remedied the second one, but not the first one, while the third numbered item was not touched at all.

Further lengthy delays took place in dealing with the problems. On December 15, the builder wrote to the President of the condominium corporation with an offer of settlement whereby it would identify major defects in common areas and in upper (presumably third floor) units and repair the same giving a one year warranty as to materials and workmanship, and in return receive a complete Release of all further liability to the condominium corporation. That corporation rejected this offer because of the last mentioned term and again appealed to the Program. The Program arranged for conciliation at this stage, but conciliation never took place because the builder agreed to come back and make the necessary repairs without insisting upon its condition. In fact, the builder did not carry out this undertaking and the dispute dragged on involving the Program further. There is a long delay during which no action appears to have been taken by the condominium corporation to resolve the problems between the time of the writing of the letter on April 10, 1990 to the builder until the writing of a letter on January 12, 1992 to the Program. It is indicated that during this period the condominium corporation retained solicitors to consider suing the builder, but eventually this course of action was not pursued because no probable source of recovery this way could be identified.

As a result of the communication again by the condominium corporation with the Program, in January of 1992 Mr. Jekabsons, a technical representative of the Program in the condominium area met with representatives of the condominium corporation at the premises on January 31, 1992 and there was initiated the correspondence and discussion which finally led to the decision letter aforementioned. At this meeting, Mr. Jekabsons told the representatives of the condominium corporation that one of the problems they had was truss uplift in the trusses supporting the roof and the discussion subsequently focused on this aspect of the whole matter. On March 18, 1992, Mr. Jekabsons wrote stating that:

...As I noted to you in my previous letter, the condition is caused by moist air infiltration into the attic space through the little room on the upper level which exposes the insulation which is not properly sealed off with a vapour barrier. I am quite confident that if you seal this area properly that your problems will be very minimal.

Another request to the Program led to the decision letter of April 2, 1992 quoted at the opening hereof. Throughout the correspondence and the evidence, there are many references to what were said to be manifestations or results of the basic problems including cracks in interior finishing and cracks in wallboard joints. Most of these were in individual units and could not be part of the claims for common elements, but some were in common elements, namely in stairwells. However, at the hearing the real concern of the condominium corporation was put forward to be the correction of the causes of these defects in the common elements.

In order to help develop its claim herein, the condominium corporation retained the services of Morrison Hershfield Limited, Consulting Engineers and obtained a report dated December 23, 1992 which concludes with two alternative recommendations to which reference was made in the evidence as 'A' and 'B':

'A' Truss uplift is likely to be considerably reduced if the movement of interior air into the space above the roof insulation can be eliminated. Ideally, this would involve the installation of air and vapour barriers at the top of interior and exterior walls, in the cathedral ceilings and in the attics. All protrusion through the air and vapour barriers, such as ducts and electrical conduits, must be sealed. Interior finishes would have to be removed to create access to do this work properly. The ceiling support system and the connections between the wall framing and the roof framing should be modified so that differential movements do not cause cracks.

'B' A second option would be to attempt to increase air and vapour tightness without removing interior finishes. Existing cracks in the cathedral ceilings should be repaired and the junction between walls and ceilings should be modified to allow for movement, where possible. This would involve the installation of caulked joints, concealed by wood trim, in locations where cracks are occurring now. Walls and ceilings would then be refinished. In addition, the exposed polyethylene vapour barrier in the attics would be replaced, sealed and supported by

new gypsum board. There is less certainty that this option will produce the desired results, but it can be done with less disruption and at a lower cost.

In further support of its claim, the condominium corporation had a contractor, Mr. William Shubat, "All Trades", attend at the premises and work out an estimate for doing all of the work required to carry out the above noted recommendation 'A' of Morrison Hershfield Limited. He presented a written estimate listing seven items of work to be done above five of six third floor units and quoted a price of \$6,800 per unit as a cost price therefor. On cross-examination, Mr. Shubat was not able to break this down as among the seven items of work.

Mr. Jekabsons on behalf of the Program gave evidence at some length upon this aspect of the case. He told the Tribunal that in his work at the Program, he is dealing constantly with such estimates from contractors and the Tribunal accepts him as qualified as an expert in giving the evidence which he did on this point. He also made a more extensive inspection of the defects being considered than did Morrison Hershfield's representatives. The Tribunal wishes to add that it was quite impressed with Mr. Jekabsons and with his testimony. He appeared to have a good grasp of what he was telling and to be as fair as he could with the Applicant. While he had reached the conclusion that the Applicant could not succeed (for the reason that its claims were not made and reported within the time limited by the Act), he said that if the claims had been made in time, he would have warranted remedial work the same as that recommended in the Morrison Hershfield recommendation 'B' and he gave to the Tribunal a detailed item by item estimate of the cost of carrying out both recommendations 'A' and 'B' which on a per unit basis, he made \$4,765 to carry out recommendation 'A' and \$600 to carry out recommendation 'B'.

Mr. Jekabsons gave another very important piece of evidence, namely that, in his opinion the principal cause of excessive moisture in the units and escaping from the top floor into the areas above and causing the truss uplift lay in the fact that the clothes dryers were vented just out into the apartment units and not to a proper duct to the exterior of the building. While he was not asked this specific question by anyone, it is a fair inference that when the building was constructed proper outside venting for these clothes dryers was not provided. If this is so, failure to install such venting when building units such as these has to be construed as a breach of a vendor's obligations as required by Section 13(1) of the Act.

Upon all of this evidence, the Applicant is claiming recovery from the Program of the sum of \$34,000, being \$6,800 as

estimated by Mr. Shubat for remedying the defects above five of the top floor units, \$1,603.96 for its costs for obtaining a Morrison Hershfield report and \$3,000 for its costs of having engineers such as Morrison Hershfield supervise the doing of the remedial work for a total claim of \$38,603.96.

It is the position of the Program that while some of the claims of the Applicant are based upon items which would have been warranted if they had been reported and claims made for them within the one year stipulated in subsection (4) of Section 13 of the Act, none of the claims here are based upon defects so reported and, therefore, the Applicant can make no recovery against the Program. At one stage, the Applicant did try to assert a claim of major structural defect based upon an argument that the existence of truss uplift constituted such a defect within the definition set out in Section 1(o) of Regulation 726 made under the Act. This argument clearly cannot succeed. The Tribunal has in a number of decisions established this. Several of these are referenced and the point is set out directly in the Kelly Comeau case in 1991 reported in 22 CRAT 600.

The critical issue therefore becomes what, if any, claims does the Applicant have, upon all of the evidence before the Tribunal, which are for the remedy of defects which were reported to the Program within the year required by Section 13(4). The reports on behalf of the Applicant which come within the necessary time frame are found in two documents, the first being a letter of January 18, 1988 in which we find the words:

Several of the owners have questioned whether vapour barriers were properly installed in the roof and around the chimneys, which conceivably could have created the wet and fallen plaster in the top level units, and wall cracks throughout the building...

and the second being the letter of June 13, 1988 where we find the words:

This letter is a request by MTCC 743 for assistance from O.N.H.W.P., to get repaired the following defects in the common areas of our building:

- 1) excessive plaster cracking in stairwells
- 2) bulging of the walls in stairways
- 3) window and door frame shifting on the top floor preventing every door and window from closing and/or locking properly.

Counsel for the Program submits that for the purpose of applying Section 13(4) the conduct of the parties throughout in correspondence and in dealing with the remedying of the defects is such that only the three defects set out in the letter of June 13 should be taken into account and he led evidence from Mr. Jekabsons to the effect that none of these three complaints listed could be the result of truss uplift and, therefore, could not come within the claim made on time.

With respect, the Tribunal does not agree that this is the proper approach to decide this issue. To do so properly, the Tribunal must have in mind that this is consumer protection legislation, which should be interpreted to carry out the intention of the Legislature to protect the consumers here fairly, that the representatives of the Applicant here when making their complaints and reporting defects in writing are not, and are not expected to be, technical experts and that the reporting required as to defects need only be as to the defects apparent to the owner and need not extend to identification of the causes of those defects. The Applicant did make complaint within the time limited of defective vapour barriers, of wet and falling plaster indicating excessive moisture collecting above the top floor units and of the three specific defects in the June 13, 1988 letter.

It was the evidence of Mr. Jekabsons, on behalf of the Program as aforementioned, that these causes which contributed to truss uplift are warrantable if reported within the first year and that the venting of the clothes dryers into the apartment units was a major cause of the moisture build-up which then found its way into those areas where it caused the damage.

Accordingly the Tribunal has reached the conclusion that the Applicant has met the onus upon it to succeed with certain claims herein. In the first place, if the Tribunal is correct in drawing the inference that proper venting for the clothes dryers was not provided in the building, the Program should be responsible to install the same now. Such venting must be installed through the exterior walls and is clearly part of common elements. On the other hand, if such venting is present and the owners have just not made use of it, the Program should have no responsibility whatever in this respect.

In the second place, to the extent that the vapour barrier is defective in the common areas above the top floor units, the Program should also remedy this and the resultant damage caused by its failure. In this respect, the Tribunal prefers and accepts the evidence of Mr. Jekabsons to the evidence adduced on behalf of the Applicant and would give the Program the option of having a contractor go in and do the remedial work recommended in option 'B' by Morrison Hershfield and by Mr. Jekabsons himself, or of paying

to the Applicant \$600 per unit for the five units required or the sum of \$3,000.

In dealing with this work to be required, the Tribunal is mindful of the evidence that, in some cases observed by Mr. Jekabsons, it appeared that some of the vapour barrier had been torn away from where it had originally been stapled and it is a fair inference that this was done by someone after the builder completed and handed over the building, and the Tribunal is also mindful of the evidence that in some places the failure of the vapour barrier led to the dislodging of the insulation from its proper place between the wooden scantlings. On this last point, the Tribunal accepts the evidence of Mr. Jekabsons that the only way in which the insulation could have come out of place, even if the vapour barrier were gone, was if someone had pulled it away. On the first point, the Tribunal considers any extra cost of replacing vapour barrier to be too minimal to warrant having to make a distinction between what may be out of place for the one reason or the other. However, the situation may be different when we come to the insulation. It may only be a case of putting it back in place in which case the extra cost will not be of consequence. But, if new insulation must be provided, the cost of this should be borne by the Applicant and not by the Program.

Finally in the third place, if there remains any work to be done to remedy the defects listed in items 1 and 2 of the letter of June 13, 1988 to bring them up to the standard required of proper workmanship and materials and compliance with the Ontario Building Code, this also should be done by the Program. As to the claims for the cost of the Morrison Hershfield report and for the supervision of the work to be done, these cannot be allowed. The claim for the Morrison Hershfield report cost does not come within any category or item allowed by the Act for recovery against the Program. With regard to the question of supervision of any work to be done by the Program's contractors, the Program will have in any event the responsibility to see that this remedial work is done properly and will be liable to the owner if this is not so and, therefore, an additional order that the Program should pay the Applicant the cost of having someone else also supervise this would, in effect, be ordering it to pay twice for the same thing.

Accordingly pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program as follows:

1. If the building was delivered by the builder to the Applicant without proper venting for clothes dryers from the units, the Program should have the same installed.

2. With regard to the vapour barrier in the common elements above the third floor units, the Program should either pay to the Applicant the sum of \$3,000 as set out above or should have the necessary steps taken to bring the same and the insulation behind it up to the standard required by the Ontario Building Code and the requirements for workmanlike construction and materials free of defects. Provided that the cost of any new insulation required in doing this must be borne by the Applicant and not by the Program.

3. The Program should have any necessary work yet required done to remedy plaster cracks in the stairwells and window and door frames shifting as identified in complaints 1 and 3 of the letter of June 13, 1988 to bring the same up to the standard warranted by Section 13(1) of the Act.

4. Otherwise the Program should disallow the claims of the Applicant.

GILDO AND CONCETTA MICELI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding

APPEARANCES:

PASQUALE IANNETTA, representing the Applicants

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 7 December 1992

Windsor

REASONS FOR DECISION AND ORDER

This is a motion by counsel for the Program to the effect that the claims or appeal advanced by Mr. Miceli is barred by statute.

The first aspect of the claim is with respect to payments paid out by Mr. Miceli under The Construction Lien Act to lien claimants as a measure of financial damage, a financial loss resulting from the vendor's failure to perform the contract and complete the construction of the house. Certainly under the provisions of Section 14(1)(a) of the Act, Mr. Miceli is entitled to be reimbursed for his direct financial loss resulting from his vendor's, in this case his contractor's failure to perform the contract.

In addition, however, Mr. Miceli, as a resident of Ontario has certain obligations under statutes other than the Ontario New Home Warranties Plan Act, and through his counsel he has acknowledged that the statutory hold back under The Construction Lien Act of ten percent as the work progressed was not made. In considering the argument, I have to examine as well, under section 14 of the Ontario New Home Warranties Plan Act, subsection (2) which provides that:

In assessing damages the Corporation shall
take into consideration any benefit,

compensation or indemnity payable to the person or owner from any source.

In my view, there was under The Construction Lien Act a provision that protects an owner so long as he withholds the ten percent of payments in the course of construction, and to me that would constitute a "payable". Mr. Miceli failed to withhold such payments and now wishes this to be considered as part of his claim for the failure of his contractor to perform the contract.

The direct financial loss which Mr. Miceli suffered in this case has been compensated for by the Program and the loss which he is now advancing is not a direct loss emanating from the failure of his contractor to perform the construction of the home, but is a direct result of his failure to comply with the statutory provisions of The Construction Lien Act. Therefore he cannot be compensated with respect to this issue.

The second ground upon which the claim of Mr. Miceli is advanced is with respect to delayed closing, as set out in Regulation 726, Section 19. This provision for compensation for delayed closing is made in respect of any vendor of a new home who fails to complete the transaction on the required date, subject to the provisions of Section 19 allowing for certain extensions. It should be noted that Mr. Miceli owned the land upon which this home was constructed and that he entered into a construction contract with the builder to build a home for him on his land. In my view, there is ambiguity in the wording of the Regulation. When I consider the definition of "purchase agreement" and the definition of "construction contract", notwithstanding the specific difference in the two wordings, the definition of "purchase agreement", in my view, includes the definition of "construction contract." "Construction contract" conversely would not include all of the elements of a "purchase agreement."

I therefore find that Mr. Miceli would be entitled to compensation for a delayed closing if the provisions of eligibility under Section 22 of the Regulation have been complied with. In looking at Section 22 it also supports my view that "purchase agreement" would include a "construction contract." In its reference to Section 20 dealing with substitutions, it seems to me that the substitution provision would also be part and parcel of any eligibility provision.

In looking at Section 22, however, I must examine the circumstances upon which eligibility for a delayed closing applies. The first element of clause (a) provides that the transaction "closes." In my view, a building contract which had a specific date for a completion would equate to a closing transaction date. But I have to look at the circumstances of this particular case;

the reference is to the "transaction." The "transaction" which is being considered here is the contract between Ciotti Construction and Mr. Miceli. In my view, it cannot extend to a subsequent contractor. Therefore, in my opinion, the contract, the closing or the completion arising out of the transaction between Ciotti Construction and Mr. Miceli never occurred and, therefore, the provisions of Section 14(1)(a) dealing with the failure to complete the contract are applicable.

I have carefully reviewed the cases cited to me and I agree with the reasoning set out in the Gene and Mavis Legacy case. I think the reasoning is persuasive and unfortunately I am in the position as far as Mr. Miceli is concerned of having to hold against him and to agree with the motion advanced by the Program in respect of this claim.

In summary, I have to indicate to you Mr. Miceli that I have a great deal of sympathy for your position and the difficulties that you have experienced, but I am in the position that I can only grant the relief which is authorized by the Legislature in this Act and unfortunately, I have found that I am unable to accede to your request for relief in these circumstances.

Therefore, pursuant to the authority vested in me under the Act, I direct the Program to disallow the claim of Mr. Miceli.

The above Ruling and Reasons therefor were orally given at the conclusion of the hearing by the Vice-Chairman.

ELWOOD AND BERNICE MILLS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

ELWOOD AND BERNICE MILLS, appearing on their own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 23 April 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a letter from the Program to the Applicants being the decision letter dated August 28, 1992, found at tab 15 of Exhibit 5. The Applicants purchased a new home to be built from a vendor/builder Fram Construction Limited by an Agreement of Purchase and Sale which appears to have been accepted on March 26, 1986. It was agreed by all parties that the date of possession and the date from which the warranties set out in the Ontario New Home Warranties Plan Act began to run was May 7, 1987.

There is only one complaint or alleged defect with which the Tribunal is concerned at this hearing and that is set out in a registered letter which was sent by Bernice Mills to the Program on May 2, 1992 in which she wrote:

I am writing at this time to advise you that we have a leak in our south basement wall and water is coming in onto the last step leading to the basement and runs onto the floor and into the furnace room area...

This happened just before we were going away on vacation in April and also while we were away and having someone check our house for us and again today, Saturday,

May 2, 1992. I am enclosing pictures showing where the water is coming in and running down the step and unto the floor and each time it is more water.

On May 7, 1987, there was completed and signed a Pre-Occupancy Inspection Report on which a lengthy list of items were enumerated. The only ones of these which could possibly refer to the defect with which we are concerned here reads:

Crack in foundation wall. Rod holes leaking in basement on 4 foot wall.

Upon the cross-examination of Bernice Mills, it was established that these two complaints were in the north wall and the east wall respectively and the leak with which we are concerned at this hearing is in the south wall.

On May 20, 1987, the Applicant sent a letter to the builder setting out a list of some 36 deficiencies. Number 24 on that list reads:

Water coming in basement especially when it rains.

On January 16, 1989, Mrs. Mills wrote another letter to the builder enclosing a list of deficiencies as of that time headed: "LIST OF ITEMS NOT COMPLETED TO DATE." These are arranged in that list under five general headings of the various inspection reports which had been prepared. Under the first of these - May 1987 - Pre-Occupancy Inspection is stated: "Water can come straight down Basement rough in (we temporarily filled home with insulation.)"

Mr. Dani Gesualdi, who is the Quality Control Supervisor with the builder/vendor, established that the leak in the area of a "basement rough in" was in connection with a rough in for a fireplace which was in the north wall and is, therefore, not connected with the complaint with which we are dealing here. Mr. Gesualdi said that it had been his understanding that the leaks of which complaint were made in the original Pre-Occupancy Inspection Report were repaired, although he was not the person from his company which dealt with them. One of the reasons he gave for his earlier belief that the complaint had been remedied was that thereafter, the builder did not hear anything from the Applicants for a long time.

The next complaint thereafter was in the letter and the list of January 16, 1989 which I have already noted referred only to a different leak in a different wall.

The next complaint received from the homeowner was by way of a copy to the builder of the letter and other materials sent on May 2, 1992 to the Program. Mr. Gesualdi gave evidence that this was the first time a builder had a complaint of a leak in the south basement wall. He stated unequivocally that the "rough in" for the chimney was in the north wall and it is clear on all of the evidence that the complaints contained in the letter and list of January 18, 1989 did not refer to the item with which we are now concerned.

There was an issue between the Applicants and the Program as to whether the Program received a written notice of this claim before the letter of May 2, 1992. Mrs. Mills said that she believes she had sent a copy of the letter and list of January 16, 1989 to the Program and that there is a reference to that in paragraph 5 of the Proof of Claim submitted to the Program on July 3, 1992. For several reasons, this does not assist the Applicants with their claim. It is sufficient to note that, dealing with the warranty period which commenced on May 7, 1987, the time then limited for reporting the deficiency was one year from that date to come within Section 13(4) of the Act. Section 18 of Regulation 726 which came into force in 1988 extended the warranty that there will be no water penetration through the basement or foundation of a house for two years after the date upon which the home was completed for possession and the Regulation provided that this amendment take effect as of June 1, 1987. This is not early enough to assist these Applicants who took possession on May 7, 1987. It is not necessary, therefore, to deal with the evidence and make a finding as to whether or not a copy of this earlier letter and complaint to the builder was sent to the Program or whether its wording would have covered the complaint with which we are dealing.

Section 4(1) of Regulation 726 provides that:

Each person with a claim under the Plan
shall give written notice of the claim to
the Corporation.

To have a claim under the Plan, a homeowner must establish that there is a breach of the vendor's warranty set out in Section 13(1) of the Act:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

(i) is constructed in a workmanlike
manner and is free from defects in
material,

- (ii) is fit for habitation, and
- (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

In the case of all defects not coming within the definition of a "major structural defect", subsection (4) of Section 13 requires that the claim be made within one year after the warranty took effect (in this case May 7, 1987) and in the case of a major structural defect, Section 14(1)(c) requires that the claim be made within four years of the expiry of the warranty to which reference is made above or within five years of its taking effect. The effect of Section 4(1) of the Regulation, quoted above, is to provide that, in order to meet the requirements of the making of claims under Section 13(4) or Section 14(1)(c), the claim must be made by notice in writing and, therefore, in this case the date of the first notice in writing upon which the Applicants can rely is May 2, 1992. This is clearly outside the one year limitation but within the five year limitation so that, to succeed with such a claim, the Applicants would have to show that their complaint constituted or comes within the definition of a major structural defect. Indeed, they recognized this fact when they filed their Proof of Claim on June 3, 1992 as they identified their claim in paragraph 3 thereof as a major structural defect. The remaining issue to be determined by the Tribunal is whether it is, in fact, such a defect.

Upon receipt of their Proof of Claim, the Program arranged for and carried out a major structural defect inspection on August 18, 1992. Present were both of the Applicants, three representatives of the builder, Mr. Danny Gesualdi who gave evidence at this hearing and Messrs. Galati and Moorcroft and Mr. Bob Thoburn, a representative of the Program who prepared the report found at tab 14 of Exhibit 5. The report and the evidence of Mr. Thoburn given orally to the Tribunal established the following which I quote from the report which references to the photographs to which Mr. Thoburn related his observations as he gave his evidence:

There was evidence of water damage in the basement stairway at the base of the drywall in the corner where the bottom raised concrete landing meets the concrete basement floor. The painted wood riser of

the bottom stair was water stained and the seam in the vinyl sheet goods on the bottom landing was lifting due to moisture. It was not possible to determine the source of the moisture, due to the finished walls in this area. The point where the water damage was most prevalent was approximately 19 feet from the front of the house.

(See Exhibits 9 A, C & I)

An exterior inspection of the south wall revealed that there were three (3) steps in the poured concrete foundation wall. Only 16 feet of the South foundation wall (measured from the east wall) was exposed, the balance was covered by interlocking stone which had been installed by the homeowner. The interlock covered half of the first course of brick and was partially blocking the weep holes. There was no visible cracks in the exposed foundation walls nor was there any cracks evident through the brickwork or mortar joints. The hydro, bell telephone and cable T.V. enter the house through the brickwork above the step foundation wall.

(See Exhibits 9 B, D, F & G)

A methodical water test was conducted at the south wall as follows:

(1) With a 1/2 inch hose water was sprayed for 18 minutes at the point where the lowest step in the foundation wall meets the interlock and the brick veneer - no water penetration was noted at the interior.

(2) The same method was used to test the area of foundation wall approximately 4 feet east of the first test. This area was tested for 16 minutes without evidence of water penetration.

(3) The caulked area around the hydro entrance was water tested for 15 minutes. A small amount of water became evident at the peeled back vinyl flooring on the bottom landing.

Water testing was concluded at this point.

(See Exhibit 9 E)

In his conclusion, Mr. Thoburn stated:

There was no indication that the structural integrity of the home has been affected by this problem, therefore, this could not be considered a major structural defect, as defined.

In his oral evidence, he gave the opinion that the complaint did not materially and adversely affect the use of the home or materially and adversely affect any load-bearing function of the building and, therefore, did not constitute a major structural defect.

Upon all of the evidence, the Tribunal must find that the defect with which we are dealing here does not come within the definition of a major structural defect set out in Section 1(o) of the Regulations.

1.(o) "major structural defect", means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

(i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(ii) that materially and adversely and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

The onus to establish their case rests upon the Applicants. There can be no finding whatever upon the evidence that we have here that any load-bearing function of any part of the

building is affected by this complaint. While the leaking of water as described by the Applicants into their basement undoubtedly had some adverse affect, it was not such as to materially affect the use of the building for the purpose for which it was intended. There is also the specific exclusion from the definition of flood damage or dampness not arising from the failure of a load-bearing portion of the building.

The Tribunal must, therefore, reach the conclusion that the defect in this basement wall which resulted in the water penetration of which the Applicants are complaining here does not constitute a major structural defect and that, pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal must direct the Ontario New Home Warranty Program to disallow this claim.

SILVERIO AND ELVIRA MOROSIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding

APPEARANCES:

THOMAS FORBES, Q.C. and DAVID CONKLIN,
representing the Applicants

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 6, 7 July 1992; 25, 26, 27, 28 August 1992;
13 January 1993. Toronto

REASONS FOR DECISION AND ORDER

On April 13, 1989, Silverio Morosin ("Silverio") and Elvira Morosin ("Elvira") signed an Offer to purchase from R.K. McDonald Dev. Ltd. ("the builder") Lot 18 of Plan 62M-571 in the Town of Ancaster for the sum of \$128,000. This became 1014 Old Mohawk Road and the builder was to construct a home on the lot for the Morosins. The purchase price was to be paid \$30,000 on signing, \$15,000 on July 1, 1989 and the balance on August 30, 1989; with title to pass when the home was completed and all outstanding monies paid for that construction and for the lot (Exhibit 8, tab 2). The contract for the construction of the home with six pages of specifications is set out at tab 1 of Exhibit 8.

The claim before the Tribunal is that for damages "due to alleged unauthorized substitutions and contract deviations by the builder", which claim was denied in the Ontario New Home Warranty Program ("the Program") decision letter of March 6, 1991 (Exhibit 6, tab 8). There are four areas of claims by the Morosins as follows:

- A. Items of contract not received.
- B. Outstanding matters of warranty.
- C. Damages suffered to home by workmen who were doing warrantable repairs.
- D. Expenses incurred by the Morosins.

The summary of these claims was eventually produced after much evidence was reviewed over six days and reference will be made

to the various fourteen items which will be developed in this decision. The summary requests:

SUMMARY OF APPLICANTS' CLAIMS

I. COMPENSATION FOR MAJOR SUBSTITUTIONS AND DAMAGES

1. Height, roof line, dormers - ceiling height, windows, doors, skylights, plaster ceilings, showers, staircase (see Exhibit 7, Tab A)

2.	(a)	Paid for Building	\$445,000.00	
		Less: Appraisal	320,000.00	\$125,000.00
		(Exhibit 8, Tab 10)		

or

3.	(b)	Paid for Building	\$445,000.00	
		Contract for Building	\$279,500.00	\$165,500.00
		(Exhibit 8, Tab 1)		

II. COMPENSATION FOR BREACH OF WARRANTY AND DAMAGES (Reference Exhibit 7)

4.	Replacement of Hardwood Floors (Tab 26)	\$14,800.00
5.	Replacement of Tile (Tab 24, 25)	18,651.00
6.	Engineer's Report (Tab 22)	500.00
7.	Heat Loss/Gain Calculations (Tab 27)	934.70
8.	Bidet, Sink, Shower (Tab 28)	—
9.	Keenan's Damage (Tab 29)	8,219.97
10.	Hotel Expenses (Tab 30)	10,353.00
11.	Storage Expense (Tab 31)	1,664.92
12.	Industrial Cleaning (Tab 32)	986.25
13.	Locks (Tab 33)	174.46
14.	Duct Cleaning (Tab 34)	<u>288.00</u>

Total

\$56,572.30

SUMMARY

I.2.	\$125,000.00	
II.	<u>56,572.30</u> (plus 8)	

Total	<u>\$181,572.30</u>	
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I.3.	\$165,500.00	
II.	<u>56,572.30</u> (plus 8)	

Total	<u>\$221,572.30</u>	
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Nine witnesses appeared at this hearing and they are:

Elvira Morosin and Silverio Morosin, the owners of the home at 1014 Old Mohawk Road in Ancaster. For ease of identification, they will with respect be referred to by their first names as "Elvira" and "Silverio". Elvira is a school teacher and Silverio operates a structural steel business and does sub-contracting in the repair of roofs and buildings. They have two young children.

Michael Nevans ("Nevans") is an appraiser of residences for banks and others who advance mortgage funds. He has eleven years of experience in the Hamilton area.

Dwight Walker ("Walker") is a Conciliator and Technical Representative with the Program since 1989, and had two earlier years as a Municipal Building official and eleven years before those, as a Civil Engineering technologist.

Kevin Keenan ("Keenan") is a carpenter carrying on business as Tri-Pal Construction Inc. and has 12 years Canadian experience. He has done many repairs for the Program under Work Schedule "B" tenders, and he employs sub-trades as required. He served five years in apprenticeship and qualified in England in 1982.

George Parker ("Parker") is a Barrister and Solicitor in Hamilton. A lawyer since 1975, he acted for the builder on the purchase of this lot 18 and on the sale to the Morosins.

John Carnahan ("Carnahan") is an architectural designer under the name of "Innovative Design" and he scaled down the original plans for the house from those which he had first drawn.

Ronald McDonald ("McDonald") is a carpenter by trade and has been a registered builder under the Program since the mid-1980's and who is the President of the builder corporation.

Steve Hilchuk ("Hilchuk") is a general contractor since 1976 who carries on business as "Total Supply Services", through a numbered Ontario company incorporated in 1987.

Elvira first reviewed the Brief of Documents (Exhibit 8), and said that the total price of the project was to be \$128,000 for the lot (tab 2) and \$279,500 for the home (tab 1) for a total of \$407,500. The plans shown to them by McDonald were marked "Proposed Two Storey Mr. and Mrs. McCloy", and had been prepared by

Carnahan in February 1989. The builder was to provide the plans, said Elvira. The "McCloy" plans were for a 4,100 square foot house with a three-car garage. The Morosins decided on a 3,500 square foot home with a two-car garage so the plans had to be scaled down but the plans as then provided (tab 4) on April 19, 1989 were not as requested particularly where the garage extends 11 feet in front of the front elevation. Also, those plans do not show the plumbing and heating details.

Seven pages of amendments to the plans were made up by Elvira on April 20, 1989 and certain of the changes were agreed to and initialled by Carnahan (tab 5). Elvira said that the final plans were to be shown for approval before they were presented to the Town of Ancaster for building approval. Those revised plans were approved for the issuance of a Building Permit on May 5, 1989.

Elvira said that the home was to have 9' ceilings on the main floor and 8' on the second floor. The reference in the contract specifications is "Framing material as noted on plan" (tab 1, page 2), and the plan by scale elevation does not have any heights marked (tab 4, page 2). In a sketch received by the Morosins from Walker, which was obtained at the Ancaster Town Hall, the heights of ceilings are shown as 9' and 8' respectively (tab 6). Elvira said that the excavation for the home was dug on June 1, 1989, and she saw on her visit to the site a pile of 8' wall studs. She said that the framer and a worker told her not to worry as the delivery was in error since those 8' wall studs were to be used in another house next to hers. While the transaction was to close on August 30, 1989, she said that the house was incomplete, the workers were disorganized and the roof had been replaced. The windows and stairs were too large for the openings she said because they had been proportioned for 9' ceilings.

The transaction closed on October 5, 1989. She said this was done to protect their investment deposit and other monies paid.

She agreed that a Full and Final Release was signed in favour of the builder on October 5, 1989, but noted the inclusion of the phrase therein in the second paragraph as follows (tab 8):

AND IT IS EXPRESSLY understood and agreed that this release and settlement is intended to cover and does cover not only all now known losses and damages but any future losses and damages not now known or anticipated but which may later develop or be discovered, including all the effects and consequences thereof, SAVE AND EXCEPT any claims pursuant to the provisions of the HUDAC WARRANTY PROGRAM.

In addition, there was also a release on the same date from Silverio's company for any monies owing for his provision of certain steel beams, posts and reinforcing rods for this home and several others which McDonald was building.

Elvira referred to the appraisal of their home made by Nevans for McDonald on September 25, 1989 (tab 10) and which showed land value at \$150,000 and building value at \$320,000 for a total of \$470,000. Nevans put a maximum mortgage amount at \$352,500. Elvira said that she and Silverio have paid \$535,000 for this home together with \$52,000 for extras for a total of \$587,000.

Elvira then reviewed the 18 contract items in her Group A which she stated were not received (Exhibit 7, tabs 1-18).

1. She said that the home was to be built with a 35' roof peak line, but has in fact only a 30' foot elevation so that the whole project has a squashed look. She said the plywood roofing had been put on, then removed and was then replaced. From a scale measurement of the plans approved, the height of the roof peak appears to range from 31½ to 33' on the four elevations.

2. The ceiling heights are 8' and 7'11" when they should be 9' and 8', respectively.

3. The windows as installed are incorrect both by size and in number. She says that none of the windows provided are exactly as those on the four elevations in the approved plans. She had the windows as set out on the plan valued at \$25,432.07 and those as provided at \$19,000 so that she claims the difference of \$6,432.07 from the builder.

Elvira showed various photographs (Exhibit 11) where the windows as installed with fan lights come up to the 8' ceiling while a 9' ceiling would have given the proper proportion, and allowed a full plaster cove to go around the room. The guest room window sill is on the floor and she said that the windows on either side are visibly uneven.

4. Further, there are three dormer windows shown on the plan front elevation and none are provided. In addition, she said that elliptical windows shown in the plans above various doors are not provided.

5. She said that they were to receive four hemlock French doors with bevelled glass and pivoting 180 degree hinges (Exhibit 8, tab 1, page 6). They have two such doors each without bevelled glass. The other two are similar without those pivoting hinges and are narrower than expected.

6. Elvira said that the following carpentry items were not provided (Exhibit 7, tab 6):

Carpentry Items not Completed:

Several items provided for in the Contract and the Plans were omitted by the Builder:

(a) Walk-in Pantry off of kitchen (reference Contract, page 3 and Morosin Plans)	
Estimated Cost of Materials and Labour	\$ 1,200.00
(b) Vaulted Ceiling in Front Entry (reference Amendments to Contract, April 20, 1989)	
Estimated Cost of Materials and Labour	2,000.00
(c) Room for Refrigerator and Freezer (reference Morosin Plans)	
Estimated Costs of Materials and Labour	1,000.00
(d) Jogs and Entry to Dinette from Garage (reference Morosin Plans)	
Estimated Costs of Materials and Labour	500.00
(e) Mouldings in Upper Hall	
Estimated Costs of Materials and Labour	<u>800.00</u>
Total Estimated Cost of Materials and Labour	\$ 5,550.00
Estimated Value of Above items to Home	Undetermined

7. Elvira said that the skylights which they received are not placed in the locations as shown on the plans. There were to be two. One was to be centred over the entrance area and another over the jacuzzi in the ensuite bath. As the photographs show, the one in the bathroom is at the linen closet door and that in the entry area opens against the second floor landing wall and serves no purposes, she says. (Exhibit 11, pages 6 through 11).

8. The kitchen was not installed by the builder, and she claims \$17,500 for this as shown in the sketches (Tab 8). She said that no credit for this omission was given in the Statement of Adjustments set out in that tab.

9. She said that the builder was to provide and install hardwood flooring, but did not do so. Therefore, she and Silverio purchased the flooring and arranged for installation. She claims \$13,946.82 for this item from the receipt at tab 9.

10. Floor and some wall tiles were also to be provided by the builder, she said. However, they bought their own and arranged for installation. She said that they were not credited for the minimum amount provided for in the contract and that the cost of this tile was \$800.00.

11. Elvira said that the builder was to provide and lay the brick for the house, but that they did this themselves and claim \$9,125.00 for so doing.

12. Elvira said that the builder was to provide cove ceilings but again they had to arrange for and pay for this work themselves at a cost of \$2,282.00.

13. Elvira said that there were to be two marble "neo angle" showers installed but only the walls and bases are there. She said that these are valued at \$6,000.00 each while what they have is only worth \$3,600.00, so she claims \$8,400.00.

14. Elvira said that there was an allowance for light fixtures of \$1,200.00 which the builder said had been used up by a few pot lights. She had paid two amounts of \$500.00 and \$444.00 to the electrician and says that no proper credit was given by the builder to them for this item.

15. Elvira said that the builder was responsible for all painting, but they had to pay \$150.00 to the painters which has never been refunded.

16. Elvira said that they expected to receive a rounded staircase from the main floor to the basement, but a square cut in the floor saw one put in which would block entry to the powder room. She said that the builder required a further \$2,600.00 to install the correct staircase, and she paid this extra for which she seeks to be repaid.

17. Elvira said that the builder was to provide appropriate grading, but they had to arrange for and pay \$1,000.00 for that work, and she seeks to be repaid.

18. Elvira said that there was to be a rounded cement front step which was not provided (Exhibit 11, page 16).

Elvira said that the Statement of Adjustments showed a credit to them of \$15,969.00 in accordance with the Schedule attached thereto, but there was no agreement about this amount. Since the builder owned the lot and could sell the house to someone else and since they might lose their investment of some \$300,000 by then, they closed the transaction.

The Statement of Adjustments (Exhibit 7, tab 8 and Exhibit 6, tab 11) is as follows:

STATEMENT OF ADJUSTMENTS

VENDORS: R. K. McDONALD DEV. LTD.
PURCHASERS: SILVERIO MOROSIN AND ELVIRA MOROSIN
PROPERTY: Lot 18, Plan 62M-571, Old Mohawk Road Ancaster
CLOSING DATE: October 5th, 1989.

RE: LOT

SALE PRICE		\$ 128,000.00
DEPOSIT	5,000.00	
DEPOSIT	25,000.00	
DEPOSIT ..	15,000.00	

RE: HOUSE

SALE PRICE ..		279,500.00
DEPOSIT	29,700.00	
DEPOSIT	60,000.00	

TAXES

1989 land taxes - \$1,031.20	
Vendor's paid - \$1,031.20	
Vendor's share - \$785.40	
Allow vendors -	245.80

EXTRAS

Allow purchasers as per schedule -	15,969.00
EXTRAS - allow purchasers as per agreement	18,000.00

BALANCE DUE ON CLOSING

\$ 239,076.80

\$ 407,745.80

407,745.80

There are ten items in Group B of Elvira's claims as outstanding matters of warranty for which the Program is liable in her opinion. The Program has been involved in some work in these areas, she said. These are referred to in Exhibit 7 from tab 19 to tab 28, and on the Summary page above as items 4 to 8.

Summary 4: Tabs 19, 20, 21, 23 and 26

Claim: Replacement of Hardwood Floors \$14,800.00

Elvira claims that there was inadequate subflooring and structural supports for the main floor of their home. She said that some hardwood flooring was taken up in March 1992 for levelling of the subfloor, and areas without blocking and support were discovered. While nails or screws should be at 6" intervals, there are 8" or 12" intervals she said, and the floor was ¼" off level.

She related these problems to the collapse of the entrance foyer area on December 6, 1989 which was later repaired by Hilchuk. While the repairs to the beams and the wall studs in the basement have been made, her claim for warranty of the hardwood flooring which was replaced at a cost of \$14,800.00 has not been accepted by the Program. This was all taken up by them and a group of friends and could not be re-laid.

She said that in the evening of their move into the house, a gurgling noise was heard and they discovered that the basement drain had backed up due to broken sewage lines. They were ankle-deep in raw sewage and had no cranks to open the basement windows. After mopping up the mess, they had this happen again three weeks later. Elvira believes that the residue of moisture in the house for those days caused the main floor joists and subflooring to be damp and deteriorate. She produced a letter from the installer of the flooring which noted that the flooring was properly installed and acceptable to the Morosins, but that problems of July 1990 are due to a high moisture content in the house, mainly in the basement area (tab 23). Elvira did not state why a delay in opening windows occurred, or why a dehumidifier was not employed to assist in clearing up this problem.

The invoice to replace and finish the hardwood flooring is seen at tab 26 and the total is \$14,181.00, with stain, polyurethane and the installation of quarter round to be done by others.

Summary 5: Tabs 24, 25

Claim: Replacement of Tile \$18,651.00

Elvira claims that the marble tiles in the front entrance and foyer have warped due to the floor subsidence problems. Also

those in the kitchen and laundry enclosure had also warped and all the tiles have to be replaced.

Summary 6: Tab 22
 Claim: Engineer's Report \$ 500.00

Elvira claims the cost of this report as a necessity to ensure that the house had adequate structural support after the cave-in of December 6, 1989. A number of structural problems were identified and the Program subsequently warranted these for necessary repairs, so she seeks to have the cost of the report repaid.

Summary 7: Tab 27
 Claim: Heat loss/Gain calculations \$ 934.70

Elvira states that this total comes from three items:

a payment to check and balance the complete mechanical system	\$ 224.70
a heating and cooling analysis	650.00
an opinion letter	<u>60.00</u>
	\$ <u>934.70</u>

She said that problems over four winters were sufficiently severe that the family all slept in one bedroom and had to use blankets to keep comfortable while watching television.

Summary 8: Tab 28
 Claim: Bidet, sink, shower

This claim of leaks and poor operation was addressed after the conciliation in June 1990 and had apparently been fixed. However, the problems developed again a few days later; and continue now. The cost of this repair is not known, she said.

The claim in Group C is that for damages caused by the attempts of Keenan and his workers to repair hardwood floors in October and November 1991, under a Work Schedule "B" for the Program. Their last day on site was December 24, 1991, and Hilchuk completed the work in 1992. This is item 9 on the summary.

Elvira said that furniture had been covered with blankets and plastic and tape, but the Keenan workers took blankets and sheets from her linen closet to cover floors, ruined a lamp shade and a blind, caused dents and scratches in her furniture and in the floors and on marble tile, and damaged an oil painting. There were

drycleaning costs and she had to pay for a cleaning lady as Keenan did not have money with him. There are also linens missing and finally she claims for labour and babysitting costs and for Silverio's waiting time.

The total of these items is made up after her evidence as follows, with a correction and a deletion:

**DAMAGES CAUSED BY REPAIRS COMPLETED FOR PROGRAM
BY KEVIN KEENAN**

1. The Program warranted for a number repairs and arranged for Kevin Keenan to attend at the Morosin home to complete them. The following is an itemized list of the damage caused by Kevin Keenan or his assistants who attended at the Morosin home:

(a)	Blankets	\$ 295.00
(b)	Lamp Shades	75.00
(c)	Painting	795.00
(d)	Blind	100.00
	
(f)	Dents and scratches to Furniture	300.00
(g)	Dents and scratches on Marble	1,600.00
(h)	Drycleaning costs	154.97
(i)	Costs for house cleaning	100.00
(j)	Missing sheets, fabric and towels	250.00
(k)	The Morosin's labour and babysitting expenses (98 hours x \$25.00 per hour)	2,450.00
(l)	Silverio Morosin's time spent at the home waiting for Kevin Keenan (60 hours x \$35.00 per hour)	<u>2,100.00</u>
	TOTAL	<u>\$ 8,219.97</u>

Elvira's claims in Group D are for expenses incurred.

Summary 10: Tab 30

Claim: Hotel Expenses \$14,790.00

The details of this claim are set out as follows:

HOTEL EXPENSES

1. The Morosins do not have receipts for the time which they spent in hotels due to the construction which was being carried on after the closing date at their home. In determining the costs of their staying in hotels during this time, the Morosins have estimated the following expenses for their family of four people:

- (i) food \$100.00/day
- (ii) accommodation \$ 70.00/day

2. The Morosins were not able to reside in their home during the following period:

EXPENSES

- (i) for 5 weeks past the contract closing date (35 days x \$170.00/day) \$ 5,950.00

3. For two weeks beginning October 6, 1989 when the Morosins moved into the home but had to leave due to sewage backup in the basement; a lack of electricity in the kitchen, laundry and bathrooms and no heating.

(14 days x \$170.00/day) \$ 2,380.00

4. For four weeks beginning in December, 1989 after the floors caved in and structural supports gave way.

(28 days x \$170.00/day) \$ 4,760.00

5. For ten days during January and February, 1989 when repair work was being done to the marble floors.

(10 days x \$170.00/day) \$ 1,700.00

TOTAL COSTS OF NOT BEING
ABLE TO LIVE IN THEIR HOME

\$ 14,790.00

Elvira suggested that 70% of the claim would be a fair repayment in the amount of \$10,353.00.

Summary 11: Tab 31
Claim: Moving and storage expenses \$ 1,664.92

As set out in tab 31, this claim is as follows:

These invoices from A.M.J. Campbell Van Lines represent the costs of moving the Morosin's personal and household effects from their original home to storage at A.M.J. Campbell Van Lines in St. Catharines, Ontario. A.M.J. Campbell charged the Morosins \$1,567.92. When the Morosins returned to their home it was necessary for them to pay to have their personal and household effects moved from A.M.J. Campbell Van Lines in St. Catharines, Ontario to their home at 1014 Old Mohawk Road. Finally, the Morosins had to pay to have their furniture cleaned. This expense was approximately \$97.00.

Summary 12: Tab 32
Claim: Industrial cleaning \$ 986.25

Three cleaning accounts were for work done on September 20 and October 20, 1989 and on February 9, 1990. These were in the respective amounts of \$400, \$462.91 and \$386.25. The first account was billed to McDonald and the other two to Elvira who said she also paid an additional \$60 to another cleaning person. In any event, the total amount as advanced is for \$986.25.

Summary 13: Tab 33
Claim: Locks \$ 174.36

Elvira stated that after they took possession of the house, they had the locks re-keyed for \$174.76 and the locks were re-keyed again after many of the repairs were completed. She said that she did not trust McDonald who may have kept an original key to the house.

Summary 14: Tab 34
Claim: Duct cleaning \$ 288.00

Elvira said this expense was necessary in October 1989 after McDonald left the house and they had taken possession.

An additional claim was then advanced as part of the major substitutions portion of the Summary. This is found at tab 35, and is as follows:

METAL ROOFING

As a result of the many changes made to the roof in an attempt to lower the roof line the slope of the garage was excessively steepened. This roof cannot be effectively shingled because of its steep slope. Snow, ice, and water work their way under the shingles and cause leaks into the garage and living room. To correct these leaks, a piece of sheet metal has been placed on the roof. It is not possible to place proper shingles on top the sheet metal. This repair creates an eyesore. If the roof was sloped properly, the piece of sheet metal would not be needed.

Elvira said that this may seem to be an aesthetic matter, but in her opinion the metal roofing reduces the value of their home.

Michael Nevans ("Nevans") said that his task was to appraise the house as a "finished" project and that on his visit with McDonald as a guide, he concluded that the house was more than 90% complete. He valued the completed house at \$470,000. He said that some finishing touches, cabinets and baseboards might be 8% and the sod for the lawn with final grading might be 2%.

On cross-examination, Elvira agreed that the size of the home was scaled down in Carnahan's plans from 4,100 square feet to 3,500 square feet, and that internal adjustments had accordingly to be made to keep the rooms in good proportion. She said that after discussion and review, a group of sketches on onion skin paper were left in her mailbox, but that no complete set of plans was given to her before they were submitted to the Town of Ancaster for approval. The plans do not reflect their wishes, and she said that they had paid dearly for signing a contract without completed plans available.

Elvira was referred to her letter to the Program of December 1, 1989 which outlined the damages to and uncompleted portions of their home (Exhibit 6, tab 20), and agreed that this letter was delivered by her to the Hamilton office of the Program on March 14, 1990.

While she referred in the letter to "paying half a million dollars for a custom built home", she agreed that the Statement of Adjustments (Exhibit 6, tab 11) showed the purchase price to be \$407,745.80, that an allowance is shown for the purchasers as per Schedule of \$15,969.00, that an allowance is shown for extras as per agreement of \$18,000 and that the balance due on closing is shown as \$239,076.80. She agreed that these credits were given, but said that the balance was paid over by cheque without seeing or agreeing to the Statement of Adjustments as a final correct calculation. Elvira said that her lawyer explained the two credits as "lump sum" items.

She said that while the final plans were 85 to 90% acceptable, the location of the garage is an error and there are other failures. Her total claim with respect to substitutions is \$137,102.62 and she believes that the windows as shown in the plans should be all included even although McDonald said the allowance of \$14,000 for windows would be enough for this house. She could not accept the opinion that anything spent over that amount was her own responsibility, but she said that all must be provided as on the plans. She said that certain windows were not provided which would have fitted into the 9' ceiling proportions, and she filed an estimate from a Dashwood window supplier which her parents had obtained which totalled \$22,493.00, and even then which was incomplete (Exhibit 13).

Elvira confirmed that the present ceiling heights are 8' and 7'11" as the second floor was reduced by 1" to allow for a dropped ceiling to resolve drywall "waves". She said that the cost of adding the 1' during construction on the main floor would have been from \$14,000 to \$22,000 according to four builders.

The 6" plaster cove was to have been in both living room and dining room, she said and a credit was to be given for their own arrangements for a plasterer to finish the ceilings. She said that her father found a worker who did the job for \$1,500 which they paid in cash and for which they have no receipt. Silverio did the drywall taping and applied the primer coat, she said.

She complained that a walk-in pantry does not exist and values that loss at \$1,200 (Exhibit 6, tab 18, #8). This was to have been a separate room with space for shelving and for a freezer, but the movement of the garage without their consent used up the available space for this.

Her claim for the showers (Exhibit 6, tab 18, #9) is for both size and quality. The smaller shower stalls are now 3' x 3' and not 4' x 4'. She also wanted marble slab and not cultured poured material walls which is not as McDonald promised after they visited another of his homes, she said. Her claim is for a

difference in value of \$8,400, but there are no written estimates for this.

As to the other carpentry items at Exhibit 7, tab 6, Elvira said the vaulted ceiling in the front entry was not provided, the jogs created by moving the garage caused dislocation of the plans and the positioning of the skylights was an error. For the kitchen, she said that the builder allowed \$12,000, but others quoted her \$17,500 and \$28,000. She said McDonald told her that the latter figure was too high, but offered to pay a moderate difference as long as she "did not go overboard".

She agreed that a credit was given for the hardwood flooring which she arranged for and paid. However, the floor was not level and when this was corrected, one doorway or another would have been $\frac{1}{2}$ " off level. The floor was relaid with the costs paid by Elvira. In her view, the various allowances are only a reference and the completed project is important for which the builder is responsible.

She said that no credit was given for the \$9,000 paid for bricks although the four-page Statement of Adjustments Schedule clearly includes \$8,550 as a credit for this (Exhibit 6, tab 11 "Schedule A", page 3). She agreed that she had no receipt for the \$150 paid in cash to painters to keep them on the job. She said that the builder had failed to do the final grading and sodding, and that the rounded front step was not provided. Her claims for these three items are \$1,000, \$1,000 and \$860.00.

Elvira said that there are no cost estimates for the increase of the roof peak from 30' to 35' from the ground, and that the missing three dormers are wanted for this house. These dormers are on the plan and McDonald's own house has them, but they were eliminated here by him. She said that there were three holes in the roof sheeting and that they paid the \$60,000 for completion at the roof stage to McDonald the day before the work was completed as he wanted the money. The roof was then taken off, the trusses lowered and final finishing occurred. A further deposit of \$15,000 on the price of the lot was also paid on August 2 without complaint, she said.

As to the inadequacy of the subflooring on the second floor, Elvira confirmed that the Program had taken up part of the hardwood flooring to properly nail the subfloor. She wants the marble and ceramics on the main floor to be all replaced and also to receive the \$14,800 said to have been paid in cash for the new hardwood flooring.

As to the Group C claims against Keenan, Elvira said that these had initially been sent on to McDonald's insurer on Walker's

suggestion. Elvira agreed that the credited amounts of \$15,969 and \$18,000 on the Statement of Adjustments were intended by the builder to be a net total figure, but she said that the details were not explained to her and she doesn't agree with the details of the 4-page Schedule that calculates the \$15,969 amount.

As Elvira understood the results of not closing the purchase, the builder could have gone into bankruptcy, the house and lot could have been sold to another and all their time, labour and money would have been thrown away. Therefore they closed the purchase. They were at the house everyday during construction and knew of all the changes to lower the cost of the project.

She agreed that \$30,000 had been paid on the lot price before construction began and that the 8' studs could have been rejected then at a risk of forfeiting their payment, but this was not done.

She also agreed that the problems with the roof line and loss of dormers could have been used to withhold payment of the further \$60,000 which was not due until completion of the roofing stage. Therefore, while in an action for specific performance or damages, the losses may at least have been much limited, Elvira said that she was not aware of such matters then.

In re-examination by her counsel, Elvira stated that she claims for an entire replacement of the present roof or compensation for the loss of value in her home because of the present roof.

Silverio confirmed Elvira's evidence that the garage was to be in line with the front of the house and that the plans were to be approved by them before submission to the Town of Ancaster for approval. He said that the 8' studs were used for the first floor and the walls were put up while McDonald was away on holidays. He did not stop the framer from continuing and was told by McDonald on his return that the 8' walls were what the Morosins had agreed to, which they had not. Silverio said that the windows did not fit, the roof trusses were replaced and the roof peak is too low for the house. He said that the framing carpenter told him that the Niagara Escarpment Commission had control over approval of roof heights and that 30' was the maximum allowed on their street.

Silverio said that the purchase was closed on October 5, 1989 in order to make a claim to the Program. On the sewage back-up problem, he said that there were no crank handles for the windows in the basement and that the water remained over one night. He maintained a claim of \$14,800 for the hardwood floor replacement since separations were occurring along the joints; and he wants the whole kitchen and hallway areas to be retiled. Silverio agreed

that he had not spoken with his lawyer at the time of the main floor stud wall construction and that the second floor deck was already in place by the time McDonald returned from vacation. The second floor stud walls were up by then but the roof was not on. He said that the roof was not high enough, the skylights were wrong and the main floor doors and windows were not proportionate, but he paid McDonald \$60,000 as requested when the roofing stage was completed.

Silverio denied using any water saw to cut the basement floor thereby possibly causing splatter which would damage the lamp shade. He said that any cement he mixed was made up outside and carried down to the basement. He said that the wavy appearance of the floor tiles is due to the floor movement at the collapse of December 6, 1989. There are no cracked tiles now, but some cracks appear in the grouting, he said.

Dwight Walker reviewed the documents in Exhibit 6, the book provided by the Program. He said that some issues in the claim were beyond his capacity to resolve and that he has received and reviewed the contract, the handwritten pages of amendments, the offer to buy the lot and many letters, binders of documents and notes, receipts and other photographs and plans in this claim. He recalls that the initial complaint was received on March 14, 1990 (tab 20) and that a Proof of Claim form for substitutions in the amount of \$137,102.62 arrived later (tab 18).

A request for conciliation was received on March 26, 1990 and the Statement of Adjustments with schedule of debits and credits gave a benefit to the Morosins of \$15,969. In addition there was a further benefit of \$18,000. Walker said that the whole bundle of all claims was uncertain and he could make no sense of the many items at issue. The whole package appears in Exhibit 17, and he repeated the decision to deny the claim as set out in the letter of March 6, 1991 (tab 8).

Walker said that he had fully reviewed the "blue volume" received from Elvira in response to McDonald's reply to the initial complaints and then he reviewed the "green volume" of further items received after the conciliation report was completed. He said that the Program was unable to sort out all of the claims for substitution.

Walker reviewed the conciliation inspection report made after his visit to the house on June 22 and 23, 1990 (Exhibit 17) and said that now all of the Schedule "A(1)" items have been completed or compensated except for shower repairs which are said to be inadequate, a claim for the front door and a final inspection report from Ontario Hydro for the kitchen.

He noted that on the "A(2)" list of items said not to be warranted by the Program, the Morosins continue their claims for items 20-ensuite plumbing fixtures, 21-window in guest room, 23-the 9' main floor ceiling height and uneven main floor, 25-the narrow french doors, 27-the shelving and electrical switch in the den, 28-the electrical switch in the powder room, 29-the rounded step down and side light panels in the family room, and 31-the front porch round step and a crack in the brick veneer wall.

Further there are portions of the additional item 32 which are also outstanding, namely:

- a) second floor ceiling height is 7'11" and not 8';
- b) the main floor ceiling is wavy;
- d) excessive moisture has damaged the subfloor;
- i) poor workmanship in the brickwork;
- j) placement of electrical plugs;
- l) scratches on jacuzzi, floors and doors.

Walker said that the "A(1)" items were placed on a Work Schedule and Tri-Pal Construction was awarded a contract to do the necessary work. Walker made re-inspection visits on July 22, 1991 and on January 6, 1992. Walker said that Keenan of Tri-Pal found the project very difficult and Hilchuk completed the project.

Walker said that the claims for damages to floors and furniture were denied by Tri-Pal and refused by the Program as there was no proof. As the Ontario Building Code only requires ceilings of 6'11", the claim for the second floor ceiling was denied.

Walker said that one Work Schedule was made up for the items remaining on the Keenan list, and another for new complaints of which some were earlier items that had been rejected twice and some other items not as yet claimed.

Walker then reviewed a further list (Exhibit 6, tab 5) and said that each item was denied as set out in his letter of January 6, 1992. He said that the Program does not usually pay for reports obtained by claimants and the claim of \$500 for the engineer's report was denied as well as those items for the heating system of \$934.70 (Summary items 6 and 7).

A further Work Schedule was prepared on March 20, 1991 with an Addendum (Exhibit 24) and on completion of these items,

everything outstanding was either repaired or a cash settlement had been given to the Morosins, he said.

Walker said that he made a reinspection on April 29, 1992, where certain items were found to be Keenan's responsibility and other warranted items have since been resolved.

Then he made another reinspection on May 19, 1992 where more items were claimed. He said that these were all resolved in a cash settlement of \$5,426, so that in the opinion of the Program everything was completed.

Walker said that he had agreed to inspect the subflooring when Elvira offered to have it taken up and he found several areas which required some levelling and additional screws. On his inspection of the flooring, he noted that an air-driven hammer was used on the screws and that some edges were split due to poor installation. He saw no effect on the subflooring or hardwood flooring from any moisture. He said that the flooring contractor should have informed Elvira if there were any concerns before installation took place.

Walker then reviewed the invoices and releases in Exhibit 25 which set out the payments made by the Program on this claim as:

to Mr. and Mrs. Morosin directly	\$ 2,990.78
	5,426.00
to repair contractors	8,475.00
	16,812.00
	1,050.00
	700.00
	2,066.07
	4,750.00
	2,967.90
	<u>7,132.23</u>
	\$ 52,369.98

In addition benefits received by
by Mr. and Mrs. Morosin in the
Statement of Adjustments were:
New Home Warranties Plan Act,

Section 13(2)	\$ 15,969.98
	18,000.00

Other work in progress and
accounts expected

	<u>9,004.91</u>
	\$ 95,343.89

Maximum amount of claim possible
by Ontario Regulation 118/91
amending Regulation 726 of
Revised Regulation of Ontario 1980 \$100,000.00

Total balance available to
Mr. and Mrs. Morosin \$ 4,656.11

On cross-examination, Walker said that he discussed the roof peak height with Dan Bodnar the local building inspector and was told of a blanket restriction on the lots in the area by the Niagara Escarpment Commission put in place upon lot severances of this parcel adjacent to the Queen Elizabeth Highway. The house sizes were to be from 3,100 to 6,000 square feet, two-storey and with a maximum of 30' to roof peak, Walker learned. Walker said he could only speculate as to why Bodnar did not inform McDonald, or whether McDonald knew and just proceeded, or whether the developer did not inform McDonald, or whether McDonald's lawyer should have known or whether the changes resulted from the Morosin's inability to afford the dormers which cost about \$3,000. He said that the roof trusses blocked the space in any event so that there was no ability to develop that area in future and the dormers would only be cosmetic. Walker said that if he could show that McDonald made this change from the approved plans knowingly, that this would then be a major substitution and could be warranted and compensated. However, he could not prove this allegation.

Walker said that the claim for the floors was denied due to conflict between the Morosins and McDonald as to possible interference with floor jacks in the basement. Also, since the Morosins installed the hardwood flooring, their claim was denied under Section 13(2)(a) of the Act. Walker said that the cost of taking up some 300 square feet of flooring and relaying the same was included in a cash settlement made with the Morosins.

Walker said that the owners have the burden of proving any claims made to the Program, and he had no proof that the heating system was not installed or operating as intended. When the heating report was provided, the Program warranted the claim but will not pay for the owner's proof of that item. As to the bidet and other ensuite fixtures, Walker said that the builder agreed to attend to these at the conciliation and that this present claim is more than one year after those repairs, and is therefore denied.

Kevin Keenan reviewed his repair work at this house over three or four weeks. Keenan said that he was there every day and whatever was done was not satisfactory for Elvira and Silverio. He left the job after a meeting in early January 1992 and another contractor was arranged by the Program. He said that the foyer and

tile areas were covered with cardboard boxes which had been opened up and flattened by the Morosins. Keenan said that he used dropsheets for any painting and that most furniture was moved and covered by the Morosins, so that he and his workers did not remove coverings, use any sheets or blankets or damage the lampshade or painting. He said that Silverio put in a water line in the basement after cutting the floor, that cement was mixed there and the debris was cleaned up on Christmas Eve by Keenan after all the items were taken upstairs. He carried the painting upstairs and said that no complaints were made by Elvira to him or his workers about any damage to furniture or other items. He said that the house furniture was heavy and well used.

Keenan agreed that he owed Elvira \$100 for the cleaning lady but said that no complaint was ever made as to the need for drycleaning. As he had drop cloths, he said that there was no need to use any items from the house, and that he would not have known where to look to find them in any event. Keenan said that he has completed 100 Work Schedule contracts for the Program over three years, and this was the only one he did not finish.

On cross-examination, Keenan agreed that this was not a pleasant experience and reviewed the Morosins' letter of January 27, 1992 which he said was his first notice of damages (Exhibit 28). He was then shown a list of deficiencies and damages outstanding as of December 24, 1991 (Exhibit 29) and the Agenda (Exhibit 30) for a meeting which took place with Elvira on December 18, 1991; and he recalled these events. He agreed that on one occasion the house had been left open.

George Parker is the solicitor who represented McDonald on the purchase of five lots and also on the sale of one to the Morosins. As these were both continuing clients, he agreed to act for both on the transaction. Parker said that he was not involved in the contract proposal or the discussions which led to the amendments pages (Exhibit 6, tab 21). He said that when conflicts developed, he continued to act for McDonald while the Morosins were advised by Peter Connor. By the closing arrangements of October 5, 1989, he said that the relationship was deteriorating. He reviewed the responses made by McDonald to the Morosin's complaints at the conciliation (Exhibit 6, tab 11) and noted that the Statement of Adjustments and other Schedules were included there which confirmed the results of negotiations that led to the closing of the transaction.

Parker said that an agreement was reached with Connor for an \$18,000 credit to the Morosins. McDonald had offered \$10,000 and Connor had suggested \$40,000. In addition, the credit of \$15,969 was based on all of the debits and credits in the Schedule. Parker said that this was meant to be a full resolution of all

issues between the parties. Other than the release clause, there were no undertakings or reservations or holdbacks in this transaction, said Parker.

On cross-examination, Parker said that he had not found a copy of the reporting letter to McDonald on the purchase of the five lots. He said that the property was in a parcel in the land titles system, but did not recall any restrictions on title placed by the Niagara Escarpment Commission.

John Carnahan reviewed his letter of opinion for this project (Exhibit 6, tab 1) which states:



"WITHOUT PREJUDICE"

TO WHOM IT MAY CONCERN:

RE: MR. & MRS. MOROSIN REQUESTED CUSTOM HOME TO
BE CONSTRUCTED ON LOT #18 OLD MOHAWK ROAD

After discussions with Mr. & Mrs. Morosin and R.K. McDonald, we established preliminary per SQ.FT. cost and SQ. FOOTAGE of house was based on this preliminary cost.

During many meetings and preliminary plans, a final plan was approved and final plans were completed. Plans were given to Mr. & Mrs. Morosin and Mr. McDonald for the final pricing.

At this time, I was notified by Mr. & Mrs. Morosin and R.K. McDonald that this house was over budget and some items would be deleted to accommodate Morosin budget (i.e. ceiling height, stonework, landscaping package, steel beams & welding, roofing and some flooring to be done by owner).

During construction I made many site inspections. Many changes were made and had been made by Mrs. Morosin on her insistence which differed from final plans. The changes were too many to list and although these changes may have seemed minor to Mrs. Morosin they had a negative effect to the overall completion of home.

After final inspection of this home, I found no fault with the quality of construction, but was not happy with some architectural aspects of the home which were created because of changes by customers.

In summary, I design homes for five custom builders in the Hamilton-Burlington area and find R.K. McDonald to be equal to all these builders in quality and workmanship. The final plans given to R.K. McDonald were always followed unless changes were requested by owners with my input.

In closing I find it very difficult to believe that this builder would make any changes at his discretion without input from myself and owners.

If any further information is required please feel to contact me.

Respectfully yours,
John Carnahan

/lm

Carnahan said that a combination of drawings and suggestions led to approval after three preliminary sets of drawings. With changes, the finished set of plans was the one approved. Due to concerns about being over budget, Carnahan said the main floor height of 8' was decided by the Morosins. He says that the main differences as built from the plans are some window sizes and the lack of dormers.

He said that Elvira made many changes in which the carpenter confirmed to him. He reviewed the amendments pages and agreed that the builder McDonald agreed with some and not with others. Carnahan said that new plans would have been filed with the Town only if substantial changes were made to bearing walls or outside dimensions. He recalled one complaint as to a delay from Elvira, but said this was resolved and their relationship was satisfactory. Carnahan said that budget concerns caused the Morosins to change foundation area size, windows, the exterior finishing and room locations. On cross-examination, he said that he was familiar with the Niagara Escarpment Commission rules and that 32' height was really allowable. He said that this height from ground level adds up to 30'8" as drawn.

Ronald McDonald said that the ceiling height on the first floor was changed to 8' by the Morosins to cut some costs and that such a height is normal on an average home. There was no need to change the plans with the Town over this, he said. The omission of the dormers was an "on-site" decision made with the Morosins, he said.

McDonald reviewed the many allowances given on the Schedule to the Statement of Adjustments and noted the extras which had been charged and the balancing credit of \$15,969. He reviewed the principle of such allowances as a guide for overall construction costs and said that owners could exceed these allowances at their own expense. McDonald said that he would not pay for an excess. He said that he placed the window order with Dashwood, but that many changes were then made by the Morosins.

McDonald said that there many changes made as construction began, but they were always by the Morosins and never by him alone. He said that the general roof elevations are built as on the plans and that the two skylights were fitted in as could best be done.

He said that the walk-in pantry, vaulted ceiling in the entry, space for freezer in the pantry and various room jogs were all agreed to by Elvira as not possible. As to the round staircase cost, McDonald said that originally it was to be round and then was made square to lower the price. He said that Elvira changed again back to a rounded staircase and there was a cost to this.

McDonald reviewed the meeting at the house on Friday evening September 22, 1989 where over several hours he, the Morosins and the two lawyers tried to resolve all outstanding issues. As there was no agreement, the issues were left with the lawyers and a Statement of Adjustment allowances were the result he said.

On cross-examination, McDonald said that the house price was reduced from \$297,000 to \$279,500 as decisions to cut costs were made by the Morosins. He said these savings included the 8' main floor height, \$2,600 for the staircase, certain ceramics, leaving the garage walls unpainted and leaving the basement stairs unfinished.

McDonald said the allowance for windows was fair and that the use of ellipticals and french doors added costs and the decision for vinyl window coverings added 4% to the price. He said that the omission of ten elliptical windows and the change to smaller french doors was Elvira's decision.

McDonald said that a credit for the brick cost is in the calculation of the \$15,969, and that the kitchen and hardwood floor claims are in that total also.

Steve Hilchuk reviewed his involvement as the Program's second repair contractor at the Morosin home. He has done hardwood flooring and ceramic renovations and repairs regularly in the past eight years and often sees water damage problems at entries and floors not level. He did repairs on the second floor foyer where damages have occurred from the main entry collapse. He said that the subfloor there was rough and weathered with some pieces used without blocking so that movement could occur. While this is suitable if carpeting is to be installed, he said that a firm base is required for hardwood flooring which did not exist there.

He inspected the whole house with Walker after the Morosins tore up all of the hardware flooring and noted some dips and insufficient nailing with a concern in the dining room since the tile flooring abutted the entry. The repairs were achieved within tolerances and Hilchuk said that he was to complete whatever work was outstanding from Keenan's contract and also attend to a new list of complaints.

In reply, Elvira said that various duplications appear on the lists of the Work Schedules for which the Program has paid and that at least one-half of the work has been redone, in her opinion, so that her claim should not be compromised by this.

In conclusion, counsel for the Morosins reviewed the Summary sheet set out earlier, and said that the Program should

only be credited for \$25,000 for the monies advanced so far since there is no evidence that McDonald built according to the approved plans. He said that the lower roof line, the lack of dormers, and the 8' main floor ceiling should all be compensated. Counsel noted that Nevans had appraised the finished house at \$320,000 (Exhibit 8, tab 10), while his clients had paid either \$125,000 or \$165,500 more than the appraised value of the contract price (Exhibit 8, tab 1).

He said that while the Morosins may have been imprudent in putting funds into the project without owning the property, they did close the purchase with the expectation that the Program would provide remedies for their problems. Further, that the hardwood floor and tile claims are necessary results from the structural failures (items 4 and 5) in the house while the cost of the reports in items 6 and 7 are necessary and should be repaid.

He would have walls taken down to repair the bidet sink and shower claim and has no suggestions as to costs, so the Program should just be instructed to repair. As Keenan was replaced with a second contractor, counsel suggests that such an event bolsters his clients' claims. The other expenses claimed are reasonable items, he said and he seeks \$56,572.30 for all such items plus the order to repair the ensuite plumbing concerns.

In conclusion, counsel for the Program reviewed the warranties and exclusions of Section 13 of the Act and the requirement of Section 14(b) for an owner to have a cause of action against a vendor for damages resulting from a breach of warranty in order to receive payment from the guarantee fund. He said that the limits of any claim are \$100,000 and that by Section 14(2), "In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source". He said that the Program has attended to many complaints in this house under Section 13(1)(a) of the Act which refers to workmanship being free from defects in material. He also said that in this case, the other warranties in Section 13(1)(c) as may be prescribed by the Regulations are found in Regulation 892 of the R.R.O. 1990 and referred to delayed closings and substitutions.

He states that the Release signed on October 5, 1989 and the changes on the Statement of Adjustment to give credits to the Morosins has lost them any cause of action they may have against the builder and therefore, their further claims cannot be successful beyond those paid for by the Program so far. He said that the evidence before the Tribunal shows that it is impossible to know just who relied on what as the contract was developed and the house was built.

On the closing of the transaction allowances were given and accepted by the solicitors for the parties, he said and there was no holdback for any outstanding items. If recourse to the civil courts is blocked by the Release, he said that now the Morosins are coming to this Tribunal to attempt to obtain redress for any residual contract claims they believe they may have and that is not what this Tribunal has the power to resolve.

He said that at several stages in the project, the Morosins brought problems on their own heads by accepting the 8' wall studs, by paying early for the roofing stage when height and dormers could be clearly ascertained and by paying much cash to many suppliers who do not provide receipts. There were no complaints about alleged contract deviations at the time and no holdback on closing, while excessive payments were handed out, he declared. He recalled Elvira's evidence that the balance on closing was paid over without any review by her of the figures developed in the 4-page Schedule.

He said that items found to be warranted are matters properly before the Tribunal, but the contractual claims beyond Section 13(1)(a) cannot be allowed unless they are proven to be substitutions as defined in Sections 20 and 21 of Regulation 892. He said that the Program cannot determine the contractual intent of the parties and that the Tribunal cannot claim jurisdiction to do so either, therefore any substitution claim must be based on some item found in the contract or purchase agreement.

He then reviewed the eighteen contract items in Group A:

1. Roof peak line: While Elvira said this was partly built, removed, rebuilt, removed again and finally in place but lower, the \$60,000 was paid on reaching the roofing stage a day early and Silverio said that the roof looked good. Therefore, any conduct by McDonald was condoned and accepted by the Morosins so this claim must fail especially since the Niagara Escarpment Commission rules were apparently known to some of those involved.

2. While the ceiling heights are not as originally planned, they meet the minimum requirements of the Ontario Building Code and there are no damages proven while evidence as to cost saving has been given. The problem of the main floor could have been stopped at the early visits to the construction site, but the Morosins did nothing so their complaint now is far too late.

3. The windows as provided are not exactly as described on the house plans, however an allowances was given in the contract of \$14,000 and any excess cost is the responsibility of the Morosins.

4. The three dormer windows in the sketch plan were apparently not in place when the \$60,000 payment was made on completion of the roofing stage. The builder says that the Morosins decided on this and their payment appears to show their agreement. In any event, there are no damages proven for this item.

5. The provision of two smaller French doors of lesser style and quality and of all four doors without bevelled glass is not referred to in any of the detailed plans, so no damage to the house has been proven.

6. The downsizing of the plans cause some adjustments in room sizes and locations and that by the evidence of McDonald, these changes were all agreed to by the Morosins. In any event, there is no damage to the house from these changes and no evidence of the value of the items claimed.

7. The skylights do not appear on the plans and were fitted in by the builder as could best be done. There is no valid claim against the Program here.

8.9.10.11.

These four claims were all included in the adjustment Schedule for the Statement of Adjustments which resulted in a net credit of \$15,569 which was given to the Morosins so these claims are not valid.

12. While the plaster cove was to be in the living room, the contract said nothing about the dining room so Elvira's claim must be denied, especially as there is no receipt for any payment for the work done.

13. The sizes of the shower bases are shown on the approved plans, but no type of marble stalls is referred to. There is no proper estimate of value here or any proof that they were not included in the allowances given by the builder.

14. There is no proof that the cost of items said to make up the allowance for lighting fixtures as we have only Elvira's claim and McDonald's denial.

15. Again there is no invoice from any painters as to any work done so the claim should fail.

16. The staircase issue was explained by McDonald as giving a credit when Elvira changed from round to square and then making a charge when she changed her mind again and wanted round as on the initial plans. Elvira's claim that this was paid in cash and a deduction was not made from the contract is unbelievable.

17. The claim for grading is not allowable according to Regulation 892. There is no invoice once again and no damages have occurred for which the Program is responsible.

18. He said that the front step is not in the contract of April 13, 1989, but does appear in Appendix B at p.12 (Exhibit 18, tab 1). Since there is no estimate as to the price of this, the claim should be denied.

19. He then reviewed the delayed closing evidence, but said that since there are no receipts from any hotels as to any expenses, this claim should be totally denied.

With regards to the subflooring problems and the tearing up of all the hardwood in the main floor, he said that the Morosins' contractor did the original work and if the floor was laid over a poorly prepared base then the Program is not at fault.

He noted that Hilchuk confirmed that any problems should have been obvious to an installer. While the Program properly repaired the second floor hallway, the Morosins again paid cash for the work they had done and do not provide any invoice or receipt. Since the Morosins chose to put in 3/4" and not 3/8" flooring and height differences at the transition to marble or tiling flooring exists, then that is their concern and not the Program's.

He saw no real damages to the floor tiles and no reason to replace the whole area. No estimate has been provided for repairs which might be reasonable (Exhibit 9, photographs 22 to 26). He rejects the claim in the summary list for the reports (Items 6 and 7) since these are not paid for by the Program. If they are necessary for the claimant to prove a claim, then they are done at the claimant's cost and he again relies on Regulation 892, Section 6(6).

As the bidet, sink and shower (Summary item 8) were repaired once on April 27, 1990 by the builder and since more than a year went by until a further claim was made, he rejects this claim as an unwarranted item. As to the claims made against Keenan (Summary item 9), he said Keenan admits owing a \$100 for cleaning costs and that again all of the other items are excluded from claims against the Program under Regulation 892, Section 6(6) except possibly the item (g) "Dents and scratches on marble" where the Tribunal must note that the house was lived in for two years before Keenan came on the scene.

He would reject the other Summary items 10, 11, 12, 13 and 14 as these are barred again by Section 6(6) of Regulation 892 since none of them relate to any "damage to the home".

Finally, he would reject any claim for the metal roofing since no notice was given in the first year of occupancy, there are no reports or evidence of any failures and no damages have been proven.

Counsel for the Program then reviewed Walker's evidence as to the arithmetic of this claim and said that any award could not exceed the balance proven to be available which is \$4,656.11. He said that the suggestion that the Program has approved large amounts of duplicated work is not proven especially when Elvira agreed that she had greatly appreciated Walker's efforts throughout this difficult matter.

Conclusions

a) The Program has paid or will pay various contract claims, and made cash settlements with the Morosins, and the Morosins received benefits on the Statement of Adjustments to a total amount of \$95,343.89. Since the maximum available for any claim under the Act is \$100,000, there is available a possible sum of \$4,656.11 which can be granted to the Morosins. There is no evidence before the Tribunal that the amounts referred to above have not been properly paid or credited to the Applicants.

b) Since the hardwood floors (Summary 4) were supplied and installed by the owners for which a credit was given in the calculations on the Statement of Adjustments, they are responsible if the work was initially not well done by their installer on a subfloor which he apparently found acceptable. A claim based on damages from several days of moisture in the basement which is said to have affected the subfloor is not proven. That claim is accordingly denied.

c) Some damage to the tiles on the main floor has occurred due to the collapse, but the necessity of replacing all tiles at a cost of \$18,651 is not proven (Summary 5). There are apparently no cracked tiles although there are some minor cracks in the mortar grouting joints. The damages here will require some repairs which are valued at \$1,000 and the Tribunal directs the Program to pay over to the Morosins that amount.

d) The claim for the cost of reports (Summary 6 and 7) are denied as the Program has liability "limited to damage to the home only" (Regulation 892, R.R.O.1990 Section 6(6)).

e) The claim for the bidet, sink and shower repairs (Summary 8) is denied as repairs were made and this claim is more than one year after such repairs.

f) The claim for Keenan's damage (Summary 9) can only be successful if those items refer to "damage to the home only" as referred to above. The only possible claim, therefore, is with respect to (g) Dents and scratches on marble. As this home was occupied for two years before Keenan arrived to do repairs and as there is no direct evidence as to the source of any such scratches, the claim against the Program must be denied.

However, as Keenan acknowledged the validity of the item (i) Costs for house cleaning, the Tribunal finds the Program liable for payment of \$100.00. All other items in that Schedule in Summary 9 are denied.

g) The hotel expenses claim (Summary 10) is not supported by one receipt or invoice. While many details have been provided for all other items, there is no supporting evidence here which could have been easily obtained. The claim is therefore denied.

h) The claims for storage expense (Summary 11), industrial cleaning (Summary 12) and locks (Summary 13) all fail as warranty claims against the Program, since none of these items refer to "damage to the home". There is no invoice presented for the claim for duct cleaning (Summary 14), and that claim against the Program is also denied.

i) Item 15 in Group A is a claim for \$150 paid over by Elvira to painters and McDonald has not denied that claim. Therefore, the claim is accepted and the Program is directed to pay \$150 to the Morosins.

j) There are three outstanding items from Schedule "A(1)" which are:

Ensuite bathroom shower repairs
Front door adjustment
Obtaining an Ontario Hydro Final Inspection Report
for the home

I place a value of \$400 for the first item and \$100 for the second, and direct the Program to pay to the Morosins those amounts; and further direct the Program to obtain the Ontario Hydro Report.

k) There are three of the items from the Schedule "A(2)" list which I find warrantable with the reference number, description, location in Group A and value as follows:

21.	Window in guest room	A-#3	\$400
25.	Narrow French doors	A-#5	\$400
31.	Front porch rounded	A-#16	\$500

I direct the Program to pay over to the Morosins the amount of \$1,300.00 to resolve these claims.

All of the other Schedule "A(2)" items claimed are not proven to be warrantable.

The other claims for substitution have not been proven as items for which the Ontario New Home Warranty Program is liable under any warranty and all are denied.

Accordingly by virtue of the authority vested in the Commercial Registration Appeal Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program:

- a) to obtain the Ontario Hydro Final Inspection Report required for this home;
- b) to pay over to the Morosins the following amounts for the claims allowed:

Floor tile repairs	\$1,000
Cleaning of house	100
Cost of painters	150
Shower repairs	400
Door adjustment	100
Guest room windows	400
Narrow French doors	400
Front porch rounded	<u>500</u>

total	\$3,050
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- c) to disallow all other claims for compensation advanced by the Morosins against the Ontario New Home Warranty Program.

NIAGARA NORTH CONDOMINIUM CORPORATION #62

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
SELWYN CHARLES, Member
JOHN HURLBURT, Member

APPEARANCES:

GLENN PARKER AND NICHOLAS FERGUSON,
representing the Applicant

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF 13, 14 April, 10 May, 20, 21 July;
HEARING: 16 August 1993 Toronto

REASONS FOR DECISION AND ORDER

The registration of the declaration and description of this project occurred on July 27, 1990, so that warranties under Section 15 of the Ontario New Home Warranties Plan Act ("the Act") take effect on that date. The project is an eleven-storey building with some 128 units and is located at 81 Scott Street in St. Catharines; and is now Niagara North Condominium Corporation #62 ("the Corporation").

The first list of some deficiencies was sent by the President of the Corporation to the Ontario New Home Warranty Program ("the Program") at the Hamilton office on November 16, 1990 and was stamped as having been received on November 22, 1990. After much correspondence and several meetings the management office for the Corporation sent a Proof of Claim to the Program on January 3, 1992 wherein some 45 claims were set out for deficiencies. Nearly all of these had been resolved by the time of this hearing. There remain eight outstanding complaints to be resolved. The total listing of all expected complaints was presented as Exhibit 6 and a summary list of the remaining eight items is Exhibit 13.

The Corporation presented the following witnesses:

Bruce Kinnee ("Kinnee") who is a member of the
Board of the Corporation and a resident since

January 10, 1989. He was the second occupant to move into the building when construction was not yet completed. Rugs were installed in the hallways six months later and the registration of the Corporation occurred 18 months after he moved in.

Brian T. Hogan ("Hogan") is an architect with seventeen years experience at Central Mortgage and Housing Corporation from 1971 to 1987. His resume is Exhibit 8 and he is qualified as an expert on project construction and review of multi-unit housing projects. His response to the Program's decision letter of March 16, 1992 on the Proof of Claim is Exhibit 9.

Brian McKeown ("McKeown") operates Shabri Properties Limited, a condominium management business in the Niagara region with 44 projects of some 2,300 units. He has had some 20 years business experience and is familiar with first year claims to the Program.

Jay Leedale ("Leedale") is a Professional Engineer since 1987 with Robert Halsall and Associates Limited and is in the group which studies condominium roof and wall problems. He was instructed to prepare a report for the Corporation on June 18, 1993 and visited the building on June 29 and 30. His report is Exhibit 14. He was to consider Hogan's report, look at certain deficiencies and make comments as to the likely cause of problems and the repairs which should be made.

The witness for the Program in this hearing was Bob Winters, who is a client-service representative with the Program. He has done conciliation for condominium projects for the past five years and is familiar with this claim. A graduate in architectural technology from Mohawk College in 1976, he was a building inspector for CHMC for six years. He wrote the Program's decision letter of March 16, 1992 (Exhibit 5, tab 15).

In his general evidence, McKeown said that he sought all documents and plans for this project in December 1990 and when the builder/developer turned over the project to the Corporation, there were some items received with others obtained since. Financial

information, master keys, the minute book and other original documents are now on hand. When a set of drawings and plans "as built" were sought, McKeown was told that the plans given earlier were all that existed, and no specifications book by the architect was ever received. The Board of the Corporation had concerns about the building as the builder/developer was un-cooperative, and the first list of deficiencies was sent to the Program by letter of November 16, 1990 (Exhibit 5, tab 6); to which Winters responded on December 6, 1990 by sending the list on to Ernie Atalick, an officer of Jennel Developments Ltd., the builder/developer. McKeown wrote to the Program on January 15, 1991 to enquire about the delay in any response, and responses from John Atalick were sent on February 18, 1991 when various complaints were reviewed with a commitment to attend to outstanding items. A conciliation meeting was held at the building on April 17, 1991 where a list of some 70 complaints was reviewed.

In his general evidence, Leedale said that he was to consider the problems of wall leakage from exterior through the cladding and the windows. Also he would investigate fire separations and stopping concerns between suite walls and corridors and pipe insulations.

In his general evidence, Winters confirmed that the first notice in writing which the Program had of complaints for this building was received on November 22, 1990, and that the declaration and description of the building had been registered on July 27, 1990 so that the warranty periods began to run from that latter date.

The Tribunal will summarize the evidence and then give our conclusions for the eight outstanding claims as they appear on Exhibit 13; and we will use the numbers for them as set out therein from the original list of Exhibit 6.

Claim 2

On the complaint list of November 16, 1990 (Exhibit 5, tab 6), there is the following:

Community Room Kitchen No tile under refrigerator; no window coverings, two lights covers missing; tile edge needs repair; rain water leaks through door.

In the Proof of Claim of November 6, 1991 (Exhibit 5, tab 13), the response by the builder at the meeting of April 17, 1991 was to have a sweep installed by May 17 to resolve "rain water at patio door". On the list of "Additional deficiencies" sent in on

November 6, 1991 is the notation under Community Room "water damage on window sills."

Kinnee said that water has damaged the parquet flooring in the kitchen and he recalled that this item was discussed at the first meeting with Winters although he did not recall if the issue was discussed later. On cross-examination, Kinnee said that leaks are coming from above the window and could be a result of expansion joint weakness where exterior caulking is needed. Kinnee thought that informing the Program of what was wrong was enough to require that repairs be done as may be necessary. The Program had replied that the onus was fully on the Corporation to prove any claim and provide the necessary evidence, but Kinnee thought that the Program should chase the builder to do the necessary work whatever that may be.

Hogan said that he looked at this complaint and surmised the problem to be a result of poor exterior caulking. He also concluded that there is an exterior slope towards the door which would lead to leaks and he would repair this by extending the waterproof membrane higher up the outside wall.

On cross-examination, Hogan stated that the water damage was mainly due to ground water leakage with the more significant source being the lack of a higher waterproof membrane. He said that a layman's observation would be of window leakage, but the problem here had a broader source.

Winters stated that this complaint was not presented to the Program in the first year of occupancy which began July 27, 1990, and only really appeared as of November 6, 1991. The item was not responded to by the builder as it was not on the list of items considered at the conciliation on April 17, 1991. Winters said that this problem could occur from excessive condensation which is not a warranted matter. He would reinspect the sills and thought the exterior ground slope suggestion could be due to soil settlement. On cross-examination, Winters said that he did not know if water was entering now. While the area of the floor under the window does not have a problem, Winters agreed that a water leak there could have an effect in another location due to travelling.

Claim 5 Front entrance door and lobby door.

On the first complaint letter of November 16, 1990 (Exhibit 5, tab 6), there is the item "Entrance door Insecure lock."

The builder's response of February 18, 1991 for this item is:

ENTRANCE DOOR

Lock - This is an excellent quality high security lock that is functioning properly with the security phone and close circuit tv camera. The lobby lock and doors were already looked at by a representative of Ontario New Home Warranty when they visited the site Nov. 06/90, and they have already informed us that the doors were acceptable. Because of the high volume of traffic using the lobby, the door closer should be adjusted periodically to ensure proper operation. The frequently used doors in the basement lobby should also be adjusted periodically by the building super.

Kinnee said that the doorway was much used by workers during construction and that the outer door would blow open and strain the hinges while the inner locked door needed repairs to the lock due to overuse. The builder had said that the doors were as specified on the plans and the Corporation has since replaced the doors at a cost of some \$5,500. He said that the doors and frames were of poor quality and that the frames were bent and off-line when installed. The Corporation now wants the Program to pay for the new doors, but Kinnee did not present any invoice for the work done.

On cross-examination, Kinnee said that construction of this building began in 1987 and agreed that the complaint on November 16, 1990 was of an "insecure lock". Kinnee was referred to the McKeown letter of July 24, 1991 (Exhibit 5, tab 8) which stated in part:

Of great concern to us is the entrance doorway which has not worked since the beginning and is now in such a bad state that we do not have security in the building, as the door can be opened without a key. This door has been checked several times at our expense and adjustments made to no avail...

Kinnee said that he had never received any builder's specifications for the doors to be installed. He was then referred to a further letter of October 22, 1991 (Exhibit 5, tab 11) which attached "somewhat dubious specifications" for the front doors.

There is a door schedule attached and item 14 refers to "(2) 2/6-6/8 Store front Aluminum". This refers to the pair of doors with the size being a store front type and having an aluminum frame. Kinnee said that since these doors as installed apparently met the specifications on the plans, the Program would not warrant their replacement. Kinnee said that the new doors work well and there is now no concern that the wind might catch them and strain the hinges. Kinnee said that the doors were not working properly on July 27, 1990.

McKeown said that repairs were done to the doors when the builder would not act. Since certain repairs to the parking garage were done directly by the Program without the involvement of the Corporation, McKeown saw this door complaint as an item which should be attended to directly in the same way. The doors have been replaced and operate properly now.

On cross-examination, McKeown was referred to the Deficiency list made up after the meeting of April 17, 1991 which states as follows:

ENTRANCE DOOR

- | | |
|-----------------------------------|---|
| - will not close or lock properly | - after inspections, agreed specifications should be verified |
|-----------------------------------|---|

McKeown agreed that he furnished these specifications to Winters on October 22, 1991 and his letter states:

Further to your letter of August 8, 1991 we have researched and found somewhat dubious specifications for the front doors of the building. We are attaching a copy of these specifications for your information. Please direct your attention to line item #14 which notes a store front aluminum thermo glazed soft closing door that does not have a fire rating. These doors were originally installed by the developer and have required constant repair since prior to registration of the Condominium Corporation. I have noted that the residents of the complex are not abusive to the doors.

In our estimation, these doors are of extremely poor quality and continue to require constant repair. We therefore request that we be allowed to immediately

correct this situation for reason of "failure of materials".

This situation has become somewhat of an emergency and requires immediate attention.

Please advise us as quickly as possible as to the steps required in order to correct these doors.

McKeown said that everyone knew that the doors had failed and were not suitable on July 27, 1990. If the doors did not meet specifications, they should be replaced. If they did, they should be repaired, he said. The doors were replaced after Winters' letter of November 11, 1991 denied warranty since specifications and industry standards were met and since an inspection on November 6, 1990 found them acceptable.

Winters said that this complaint was only of an insecure lock and nothing was said of abuse, or of twisted frames on April 17, 1991. These doors need regular maintenance and adjustment due to heavy usage but they did not need to be replaced where the Program would be liable for any cost of so doing, he said. The specifications were verified and the doors as installed were satisfactory, and there were no defects of material in his opinion.

On cross-examination, Winters confirmed that the doors were satisfactory when he inspected them on November 6, 1990; and when he reinspected them on October 30, 1991; and that they met the specifications when they were found. He said that a gust of wind could cause damage only if the closer was removed.

While replacement of the doors may have been generally discussed with McKeown, Winters said that the door was not warranted since there was no substitution from original specifications, the installation was workmanlike and the component materials had not failed. The doors were operating normally when he saw them and regular maintenance is a duty the Corporation has, in his opinion.

Claim 18

In the letter of November 16, 1990, there is a complaint in the paragraph Building Interior which states: "rain enters outside wall into units resulting in damage to units".

Kinnee suggested that poor external caulking of seams and joints is the cause of this problem. He has seen damage to wall paper and window frames in units 703, 704, 404 and 207. He said

that the builders admitted that caulking is not completely done, but work was stopped by the Ministry of Labour when roof anchors were found to be missing which was a safety hazard for workers.

On cross-examination, Kinnee was referred to the letter of July 24, 1991 from McKeown and the Deficiency list from the meeting of April 17 when he was present. The follow "response" notes appear under Building Interior - rain:

- Ernie stated that caulking contractor, Creative Caulking, has re-done caulking in some areas. Owners in most areas are still complaining of water entering through and around windows and walls, etcetera. Brian to contact Walt Dickson of Creative Caulking to see which areas have been re-caulked and a notice sent to all owners in this area to see if they are still having problems. A report will then be given of those areas to Jennell and O.N.H.W.P. and the re-caulking of the entire building to be completed by July 27th. It was acknowledged that any damage inside a unit as a result of the water penetration will be covered under the H.U.D.A.C. warranty. Also, the warranty for the water penetration as a result of lack of caulking would be extended for one year from the date that the re-caulking is done.

Kinnee did not know if any report was ever given to the Program or if any complaint was ever made in writing in the first year to the Program about drafty windows or about stress cracks in windows due to frame tension. He did not know if the windows in the building were ever said to be sub-standard within the first year of warranty.

Hogan stated that he visited 10 units in the building and saw evidence of water damage from leaks in nearly all of them. Drafts were evident and many had used tape or weatherstripping while some had replaced the hopper type of lower opening windows. In his opinion, the windows were not up to the required standards of the Ontario Building Code and the CSA-440. He saw no evidence of the thermal break required within the constructed steel window frame which he thought might be Italian-made, although there are no markings. The glass unit is Canadian, he said. While problems were attributed to lack of caulking, Hogan said that he sees more possible sources for the problems.

He notes that the cladding on the building is insulation with mesh and synthetic stucco which may allow leakage. Further, the flashing details are inadequate especially on the 135 degree angles where junctions of shallow horizontal and deeper vertical joints can need caulking. Also moisture may accumulate in the hollow vertical mullions, in his opinion. Hogan said that he got a set of building drawings from the City of St. Catharines office and there were only some notes on the drawings and no separate volume of details so that the plans as filed are incomplete. Hogan said he needs to explore by further tests before he can conclude what repairs should be done.

On cross-examination, Hogan agreed that he had done a limited visual inspection of the building on March 18 and April 6, 1993. He focused on the items in the Program's decision letter of March 16, 1992. He said that no destructive testing of windows or walls was done due to cost which the Corporation would have to pay and due to the disruption which unit occupants would have to suffer. While no further tests were done, Hogan said he could feel air leakage around window frames, but he did not see actual water leakage. He looked at 10 units on various floors since calls were made on short notice to those who would be available. Hogan found the architectural drawings for the building to be limited by lack of details so further study is needed to decide what repair must be done, he said. He admitted that he did not speak with the builder, the architect, or any construction supervisors. He said that the plans as filed with the City of St. Catharines met the standards for the issuance of the Building Permit and did not have to be in full detail for that to occur. He did not speak with any City building officials and did not know if any Work Orders to comply with certain items were ever issued.

Hogan said that the joints of the wall panels can channel water and that this possibility should be investigated further. Both this concern and the matter of inadequate sealing can only be known if panels have 'destructive testing', he said.

As to the windows and glazed units, Hogan said that the snap-on window stops have questionable seals, and that clear silicone sealer will break down after exposure to the sun's ultra violet rays. There is an operable crank out window in each unit room and leaks after only four years are unusual.

Hogan agreed that windows with a thermal break were not required by the Ontario Building Code before 1990, but that good practice would have used such windows. Hogan said that he could not do an evaluation of the windows since he did not know their source and did not find out by asking anyone; although he did drill a hole in one and probed about to see if a thermal break was evident. Hogan could not confirm that there were damages evident

in the year ending July 27, 1991. He said that windows would have to be removed and opened up in order to learn if a thermal break was installed and that he had not done any hose tests to see if water leaks would occur.

McKeown said that Ernest Atalick of the builder/developer was present at the meeting of April 17, 1991 and had agreed to the re-caulking as set out in the earlier excerpt from the record of that meeting. McKeown stated that the caulking person would not return to finish the job as he said to McKeown that he had not been paid for earlier work. He said that Winters had told him not to hire anyone for expert reports as the builder would likely comply with the commitments made on April 17th. Since the lack of roof anchors brought a Ministry of Labour stoppage, the Corporation could not investigate the outside of the building until the Program had them installed in the Summer of 1992. McKeown said that many residents complained to him of water penetration damage and he told Winters in April 1991 that caulking was needed. McKeown said that the receipt of the Program's decision letter of March 16, 1992 showed that the Program was not on the Corporation's "side", and that he did not hire consultants since the Corporation would have to pay for reports for which the Program would not reimburse the Corporation.

McKeown said that he was concerned that a hearing before this Tribunal of any appeal could take up to two years to arrange and therefore he met with Winters and others on February 9, 1993 to sort out many complaints. Many items on the "denied" list were sorted out with dollar values put down and one-half of the items were resolved.

McKeown then reviewed his correspondence on the roof anchor issue (Exhibit 5, tab 10) where three quotations were received and the work was done because the Ontario Building Code required the builder to have these installed. This was the pattern McKeown had expected for the garage floor and caulking issues. McKeown was not aware of any particular complaint about sub-standard and drafty windows made in writing to the Program in the first year.

Leedale said that he had looked at the exterior of the building from the ground with a spotting scope and also reviewed the plan drawings. He visited 13 suites and spoke with Hogan directly during his visits on June 29 and 30, 1993.

He found in each suite a typical pattern of small circular stains on the top corners of bay windows, and at wall-ceiling intersections. There were some long stains from water leaks and water stains could be seen along the seals of operational windows. He said that many of the hopper-style opening windows did

not seal tightly and that condensation would occur in winter if there was no thermal break in the frame of the window.

On cross-examination, Leedale said that while this hearing had been adjourned on May 10 until July 20 to allow for further reports to be promptly prepared, his firm was not formally retained until June 21 which was some six weeks later. He had the Hogan report to consider and the areas to be investigated were the exterior walls, the windows and fire/sound separations. These correspond to Claims 18 and 19. There was no "destructive" testing of walls or window frames. Leedale was looking for probable causes and possible repairs, but this report was to be preliminary. Tests were suggested with a bosun's chair to be used to see caulking gaps and a water hose to be used to test the sufficiency of repairs, but no tests were in fact done.

Leedale said that he would ordinarily distribute a questionnaire to all owners/occupants, but he used the list of 36 who had responded earlier. None of the builder's 23 units were visited. The only wall openings made were at Suite 111, since the pipe chase holes between units were already large. Leedale concluded that the stains inside the window areas could be from direct outside leakage or water that may have travelled or from condensation. In his opinion, the insulcrete product has insulation applied to steel studs with a tough outside polymer coating. If there are leaks, the water will go into the building so that a review of all caulking seals is needed.

The "hopper" windows will have a water overflow on the track if the gasket seal is not complete, he said. He saw drain holes, but did not do any water hose tests. Leedale said that he could not confirm that the windows as installed met the required standards or that thermal breaks exist in the window frames and said he had not seen the four reports of Exhibit 16 which state that they do, and give the names of the suppliers and installers of the windows who could have been contacted by him.

Winters said that this claim was not received in its present form as the complaint letter of November 16, 1990 only refers to "rain enters outside wall into units resulting in damage to unit". The builder's response of February 12, 1991 for this item was:

Building Interior

Rain - Caulking contractor scheduled to correct when weather permits. If you are able to provide information on any specific areas it would be helpful.

Winters said that no information was provided as to specific locations throughout the building, and nothing was said about the quality of windows, or that they were drafty or had some stress cracks. Winters said that inside damage is warranted where there is a valid complaint, but he has no details of the areas affected so he has not been able to inspect.

Claim 19

In the complaints letter of November 16, 1990, there is a reference under Building Interior to the item "odors and sounds travel unit to unit."

Kinnee said that this problem was due to incomplete insulation and gaps and that others in the building had complained of this while he had not been personally bothered as his is an end unit and he has a neighbour who is not at home very much. On cross-examination, Kinnee said that sound and odors are sometimes noticeable in the hallways.

Hogan explained that there is a common vertical pipe space where kitchens back on to each other for most units and he has seen holes around pipes and many openings and intersections without seals or insulation to block transfers. He said that many paths are open for sound and aroma transfers and that at least all of the pipe chases should be insulated and sealed. Also, electrical closets on each floor and baseboards should be done. On cross-examination, Hogan said that he had visited 10 suites and all had holes with some attempts made to use a foam sealant. Hogan did not contact the City Building Department or the Fire Department about these concerns as he was not instructed to do so. He found gaps and unsealed pipe holes in kitchen sink areas of several units.

McKeown stated that a notice was posted for anyone to note complaints of sound or aroma, but there was little response. Leedale said that the Ontario Building Code standards for sound insulation were not met by the builder and that he probed baseboards outside unit 111 and found acoustic sealants generally while some electrical receptacles also appeared to be satisfactory. He also looked at the kitchen pipes in unit 111 and found the situation satisfactory. While the quality of work improves on the upper floors, Leedale said that the TV cable passages were poorly sealed. On cross-examination, he confirmed sound problems at four units and fire-stopping concerns in some of the electrical closets, especially on 3rd floor north and sixth floor south.

Winters said that the complaint of sound and odour travel was raised in the first warranty year, but nothing was said then about the fire stopping concerns. The builder's response to this

complaint was that "Walls between units are sealed as per building code, they have been inspected and approved by the City building inspector." Winters says that he has insufficient evidence of these concerns upon which to make any warranty. On cross-examination, Winters agreed that people living closely to each other would be more sensitive to sound and aroma than if living in separate homes, however he had no list of units to visit and inspect. He said that a technical audit of the building would only discover concerns in this area if specific questions were asked and many persons responded. The causes would be back-to-back kitchens on electrical outlets, TV cable not sealed and a lack of insulation in various places, in his opinion.

Claim 20

The complaint here is that "many screens on units do not fit". This complaint first appeared on the Additional Deficiencies list filed with the Proof of Claim which the Program received on November 7, 1991. Kinnee said that three or four units do not have screens while many have poorly fitted ones, but he has no list of particulars. On cross-examination, he agreed that the Program had denied this item in the decision letter of March 16, 1992 because the claim was not made within the first warranty year. He said that his own screens have gaps and some 90% of the building's units are also likewise affected, but only some occupants signed a list posted for this concern.

McKeown said that many screens are missing and others are poorly fitted, but he has no list of which are which. McKeown said that no complete survey was made for Claims 18, 19 and 20 in the building since the developer had changed the locks for his 46 units until a Judge ordered otherwise, and a survey has not been done since.

Winters repeated the Program's view that no complaint of this matter was received in writing by the Program in the Warranty year and, therefore, the claim was denied. Further, nothing was said at the meeting of April 17, 1991 and no list has ever been received since then.

Claim 37

This complaint appears in the list of Deficiencies filed with the Proof of Claim of January 8, 1992. The item is under the BUILDING EXTERIOR group as item m):

Insulation does not exist between units where adjoining washroom and kitchen pipes exist. We also suspect a lack of insulation in the other walls as well.

Winters said that this claim was denied since it was made after the first warranty year had passed. The only insulation reference made within that first warranty year was with respect to Claim 19, he said.

Claim 45

On December 9, 1992, a letter was sent to the Program by Shabri Properties Limited which said in part:

As I noted in my correspondence, it is our intention to advise you of any deficiencies that we may discover that were not obvious during the first year of operation.

As you are aware, the roof anchors have recently been installed under a New Home Warranty Claim and as a result we have recently had all the windows in the building cleaned. These windows had not been cleaned since the building was built and were thick with dirt and grime. During the cleaning it was discovered that the windows had been severely scratched and marked by the developers contractor during installation. These marks were not obvious until the windows underwent this thorough cleaning.

We are, therefore, advising you of these deficiencies and requesting that they be added to the Corporation's Claim under the New Home Warranty Program.

Winters said that this complaint was well outside the first warranty year, and the claim was denied in a decision letter of January 11, 1993. These two letters are found at tab 16 of Exhibit 5.

Claim 46

On October 30, 1991, the Corporation sent on to the Program the report of an annual fire sprinkler inspection (Exhibit 5, tab 12). Certain Ontario Fire Code deficiencies were noted and repairs and improvements were recommended. The Corporation believes that these should be warranted items under the Act and the responsibility of the builder/developer should be enforced by the Program. On November 11, 1991, the Program denied warranty as the claim was beyond the first warranty year and as some of the items

should be considered ongoing maintenance and that the building was inspected and Occupancy Permits were issued by the City of St. Catharines.

When Mr. Parker as counsel for the Corporation sought an adjournment on May 10, 1993, for further reports to be prepared, he said that the builder/developer of this project was defunct and that tradesmen on the project were now un-cooperative. He noted that problems exist in this building, but that the Corporation would have to undergo some expense to sort out all of the details of the claims.

Counsel for the Program said that there had been ample time from November 16, 1990 to refine and review all of the details of each complaint and the Corporation had been warned to list all complaints and give full details so that the Program could inspect everything and decide upon warranty. There has been occupancy since early 1987 and the warranty year ended on July 27, 1991, he noted.

He was concerned that many units were not inspected, that occupants were not visited by McKeown the Property Manager who was well experienced in condominium management and that there has not been provided clear proof of details of the complaints which the Corporation needs to succeed. The Corporation apparently wants the Program to prove the case, so that any costs are not paid by the Corporation for any tests and reports.

If even a list of affected units had been sent in to the Program, inspection could have been made and concerns accumulated, but the Corporation has failed to do even that much, he said. The Program does not prove the claims for any claimant, he noted and the evidence placed before the Tribunal has been very poorly prepared. With a short list of eight items now outstanding, the Tribunal allowed the adjournment until July 20 so that necessary detailed reports could be prepared.

On July 20, the Tribunal learned that a report was available from Jay Leedale which is Exhibit 14. Unfortunately he had been retained only on June 21, but this report was not made available to the Program until July 13 and counsel could only review the report with Winters on July 15. Again someone allowed the passage of six weeks before action was taken to get on with the proving of the Corporation's claim, and whoever is responsible has done a great disservice to the Corporation. If reports had been promptly and thoroughly made, at least several of the items before the Tribunal may well have been resolved.

The Tribunal was able to learn from Leedale's evidence that no cracks were noted by him using his spotter scope which may

lead to inside damage by water. We note from the photograph in Exhibit 15 what may be bulges in the exterior insulcrete which could be caused by retained moisture that cannot escape outside. Leedale believed that the ends of the control joints may be the source of problems as photographs 10, 11 and 12 show with the 135 degree angles therein.

Leedale said that useful conclusions could be drawn from visual inspection and likely sources of problems could then be learned. He would now access the exterior walls to find any evidence of water leakage and then repair and do water tests. The cost for a sampling of areas might be some \$4,000, he said.

Leedale had seen other buildings with similar problems and found that the sealing of the joints resolved most concerns. He would do a questionnaire survey of all units before he did any work. Leedale stated that the insulcrete wall system was more expensive than others and is no longer available. He finds that the seals at the ends of the control joints are the most likely source of water and this could be an ongoing maintenance concern.

We note that the group meeting of April 17, 1991 became an "pre-conciliation" meeting to review all outstanding issues. We find that McKeown is an experienced manager who could have brought along any expert he wished to help in proving the Corporation's claim. Winter's letter of April 29, 1991 (Exhibit 5, tab 7) gives the Corporation full instructions as to what had to be done to prove the claims for warranty. The letter states:

Thank you for attending the pre-conciliation meeting on April 17, 1991. Many questions were answered and both sides now have a task at hand.

The Board and Property Manager must go through the specifications and quote the areas which specify the items which they feel they should have received. They must also list specific areas of deficiencies that were previously noted in general terms.

The Board must also inspect the Builders repairs and notify the Warranty Program after the May 17/1991 deadline on how the repairs are progressing.

The Builder must make all the repairs to the satisfaction of the Board. The smaller items agreed to by both parties

must be completed by May 17th, the small items on the list handed to the Builder on April 17th, are also to be completed by May 17th.

The larger items such as exterior envelope repairs must be completed by June 30/91. It was also discussed that these repairs must be warranted for a further year.

If these deadlines are not met a conciliation meeting will be arranged following the 1 year anniversary date of July 27, 1991.

The Ontario New Home Warranty Program appreciates your participation in resolving these matters and looks forward to your full and friendly co-operation. If you have questions or further clarification is required please write to me directly.

In conclusion, Mr. Ferguson stated that claim 5 for the doors depends on witness credibility. He finds the doors and frames to be of poor quality with insecure locks and found the replacement of them by the Corporation to be reasonable. He had no invoice or proof of payment for the new doors. He grouped together claims 2, 18, 19 and 37 and saw the issue here as the attempt to isolate the causes of a result which was accepted by the Program. Claims 18 and 19 were acknowledged by the Program to have been made in time although details were incomplete, he said.

Since water damage is evident by the testimony of the witnesses and by the clear photographs, he believes that the Program can proceed to correct those damages. A full analysis and a complete test of every window and crack is more than is needed to prove this claim, he says. Therefore, claim 18 is proven and the likely cause is leakage from outside so that the exterior skin of the building must be repaired. If lack of insulation is found then claim 37 is also proven, he said. Protection from rain is a serious concern in any building, so that the Program must now act to make repairs for which the builder is responsible, he said. Since there are leaks and Leedale concludes that external problems exist, Ferguson believes that the Corporation has proven these claims 18 and 37 and also that claim 2 is included in the greater area. Counsel for the Corporation stated that claims 2, 5, 18, 19, 20 and 37 all find their genesis in the list of April 14, 1991.

Since the Program did the repairs to the garage slab and required that the roof anchors be installed, he sees the duty of

the Program to do the necessary work without the detailed requirements of proof of every item. He accepts Leedale's view that a "repetitive pattern of leakage" is seen since any water may travel inside the building. The problem has been shown and "all information reasonably required" by Regulation 892, Section 4(4) has been provided.

In addition, claim 19 has been sufficiently shown and accepted as a matter to be attended to by the Program, he said. No further comment was made on claims 20, 45 and 46.

In his concluding remarks, counsel for the Program sees these claims for common elements matters to be required within one year of registration as set out in Regulation 892, Section 6(5) and Section 15 of the Act. Notice has to be given in writing for warrantable claims and the references for claims 2, 18, 37, 19 and 20 are too general for the Program to act upon. If actual units are cited in those claim areas, the Program could inspect but warranty coverage must be refused otherwise. The Act requires that a defect be shown and that damages occur. A repeat of the claim is not enough, he said.

He repeated the opinion that various symptoms have been cited as possible causes of water damage, but asked which of the 128 units of the building were affected. Noting that the decision letter had accepted many items as eligible for warranty, he reviewed the garage floor and roof anchor decisions. In both situations, the Program received information and then acted, he said.

Of the eight claims, he said that nothing was said in the list of November 16, 1990 about replacing the front doors and the window sill damage in the community room was not mentioned. Claims 20 (screens), 37 (lack of insulation), 45 (window scratches) and 46 (fire and safety items) were not mentioned at all in the first year warranty term, he said. He agreed that claims 18 (rain entry) and 19 (odours and sound) were mentioned in time.

Due to the delivery of a new list of complaints, the conciliation meeting of April 17, 1991 became a "pre-conciliation" meeting to allow the builder to consider the new items and to encourage resolution of many issues.

For claim 2, he said that any damage caused to the floor by rain leaking through the door had no proven relationship with concerns about damaged window sills in the community room kitchen. Where the parquet flooring was incomplete, it was completed, he noted. Neither Hogan or Leedale dealt with this concern, he said.

For claim 5 concerning originally "an insecure lock", the doors have been replaced so that the Program will never know what their problems were. Now the Corporation wants the Program to pay an unknown amount in compensation and that approach is not acceptable. The Program has a liability which is limited "to damage to the common elements only" by Regulation 892, Section 6(6) and there is now no means to calculate that appropriate total. The Program will not just simply pay the bill for work which may or may not have been necessary, he said. In any case, there was no complaint in writing in the first warranty year about substandard doors or twisted frames, and the doors as installed met the original specifications.

Counsel for the Program said that reference to drafty windows in claim 18, fire stopping concerns in claim 19 and the missing screens in claim 20 are all new issues of which the Program did not receive any notice in writing in the first warranty year. Also the insulation lack in claim 37 only arose on January 9, 1992 as a building exterior item which is separate from any of the interior items of odours and sounds in claim 19.

As to claim 45, counsel said that no evidence has been provided as to any damage or scratches having been done by the builder and this claim was received on December 14, 1992 which was well beyond any first year warranty. No evidence as to the number of windows or the extent of the damage has been offered.

Counsel would also have claim 46 denied as it arose on October 17, 1991 after the first year warranty had passed.

Counsel noted that the Program's decision letter herein was issued on March 16, 1992 and the Corporation hired Hogan on March 11, 1993. The Corporation allowed a year to go by and had not as yet the evidence to prove the claims here, he said. Since there is no list of units affected by claims 18, 19 and 20, the Program can not examine any complaints and the Corporation is to be faulted for the inadequacy of the evidence which has been given. While Hogan's report could have led to the Program being given an opportunity to look at various complaints, there was no detailed review but only a "limited visual inspection".

Because of the lack of detailed proof of damages to common elements, counsel would have claims 2, 18, 19, 20 and 37 all dismissed. In addition, he said that claims 2, 20, 37, 45 and 46 were all beyond the first year warranty period when the Program was notified in writing about them.

The Tribunal has considered the evidence brought and the comments of counsel concerning the eight complaints before us. We find that the replacement of the doors removed the right of the

Corporation to claim warranty for repairs and therefore must dismiss claim 5.

We further find that claim 20 has not been proven and that claims 45 and 46 are both made beyond the first year of warranty. We therefore direct the Program to disallow claims 5, 20, 45 and 46.

We note that the general principles of claims 18 and 19 are accepted by the Program, but that the evidence as presented so far has been most unsatisfactory upon which to allow the Program to investigate and decide upon warranty. Because of the water damages, we find merit in the factors about claim 37 for which we heard evidence. We conclude that the Corporation has a clear duty to present detailed information on each part of claims 18, 19 and 37 as they affect each unit or area in the building.

The preliminary reports of Hogan and Leedale are not good enough and we expect that destructive testing must occur for windows and walls to prove the claims of the Corporation. The particular concerns of TV cable holes and the sloppy situation which the photographs of the electrical rooms show must be clearly set out in detailed reports for which the Corporation will have to pay.

We include in this concern claim 2 which we direct the Program to allow, and would require the parquet floor to be repaired and parging of the exterior wall if water leaks are a problem. The water damage on the window sill is to be inspected to determine if the cause is condensation which is not warrantable or if leakage has occurred which is to be repaired.

We therefore require detailed engineering reports from the Corporation for all aspects of claims 18, 19 and 37 to be received by the Program by December 1, 1993. On receipt of the reports and after investigation by the Program, a decision as to warranty is to be made. If matters are not then resolved to the satisfaction of the Corporation, an appeal from any negative decision can be made to this Tribunal for those three claims. If detailed reports are not received by the Program by December 1, 1993, then the three claims are disallowed without further recourse to this Tribunal. If any units in the building are not available for inspection and inclusion in the engineer's reports, then any possible claims for damages within those units will clearly be denied.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

ABNASH NIJJOR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
GERRY BEECH, Member
HANS G. KEPPLER, Member

APPEARANCES:
TERRY CARSON, agent for the Applicant

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 1 December 1992 Toronto

REASONS FOR DECISION AND ORDER

There are two matters in issue which the appellant invites us to consider and a third acknowledged as a deficiency by the Program which involves only the method of repair.

Mr. Nijjor took possession of his home at 83 Riverdale Drive, Etobicoke on August 31, 1988. His claims, all made within the first year of possession, involve the following:

- 1) Main front door hard to close;
- 2) Ensuite standing shower has a hot water hammer;
- 3) Floor rolls in breakfast area and kitchen area (deflection of approximately 3/8" or more).

After a conciliation meeting at the residence and a reinspection on August 19, 1991, the Program advised Mr. Nijjor that the first "complaint had been resolved by the builder and in a good and workmanlike manner and the door operated normally, therefore no further action is required on this concern."

Mr. Nijjor's complaint, however, has to do with finish on the edge of the door which he contends does not match the rest of the door. Having the benefit of a photograph tendered by Mr. Nijjor (Exhibit 6), we cannot disagree with his objection.

The door simply looks unfinished and should not be left in that manner. We, therefore, uphold this claim. (re Pinho). With regard to the second item, we do not find sufficient evidence to uphold this claim. The evidence presented by the Program to the effect that the matter has been satisfactorily resolved persuades us that the problem, if it exists at all is de minimus and requires no further consideration (Exhibit 5, tab 14).

The final claim conceded by the Program as having some justification involves only the method of resolution.

On January 14, 1991, the Program wrote to Nijjor:

In response to your letter of January 3, 1991, the Warranty Program has always been prepared to undertake the repair of the kitchen-breakfast area ceramic tile and to make the floor system conform to the Ontario Building Code. However, as you did not allow our contractor access to the dwelling to prepare an estimate we have been unable to resolve your concern. In order to fulfil warranty obligations you are required to permit our contractors access to the dwelling to "unwarranted repairs".

After a meeting with the Applicant on May 2, 1991, the Program again advised him the following day of its agreement to repair the floor, but rejected the conditions imposed now by Mr. Nijjor:

This letter is to confirm our meeting of May 2, 1991 at the Brampton Regional office.

We discussed the method of rectifying the undulations in the breakfast and kitchen area by means of removing the existing tiles, making the floor conform to the Ontario Building Code and then replacing the ceramic tile flooring.

You had indicated that you would not permit our contractors to commence the above mentioned repairs unless the following terms and conditions were provided to you by the Warranty Program:

- a) accommodations be provided to you and your family for the duration of the floor repair;
- b) if accommodations are not relatively close to schools then provisions must be provided for your children to and from school;
- c) the dye lot match of the replacement tiles in the kitchen and breakfast area must be exactly the same as the existing hallway tiles;
- d) or, the alternative to all the terms and conditions would be a cash settlement of \$12,528.00 (twelve thousand five hundred and twenty eight dollars) to resolve all outstanding warranted items.

As I indicated to you at our meeting, the Warranty Program is not in a position to agree to the above terms and conditions as you set forth at our meeting. Your entire file will be reviewed and you will be advised shortly as to the conclusion.

A further meeting was held on June 5 resulting in the following Proposal by the Program:

June 11, 1991

Mr. & Mrs. Nijjor
83 Riverdale Ave.
Etobicoke, Ontario
M9V 2T8

Dear Mr. and Mrs. Nijjor,

This letter is to confirm our meeting at your residence on June 5, 1991. In attendance was Mr. & Mrs. Nijjor (homeowner), Mr. Maida (builder/vendor), Mr. Pascali (Pascali Contracting), Mr. Mancini (Ceramica Tile Ltd.), Mr. Rosset and Mr. Vandermeij (Ontario New Home Warranty Program).

The purpose of this meeting was to determine a suitable method of repairing the undulation that occurs in the ceramic tile floor of the kitchen/breakfast area.

Mr. Maida agreed to rectify the concern by removing approximately sixty (60) square feet of tiles along the crown floor joist. The joist will then be shaved to provide a flat surface for the installation of identical tiles. The floor joist below the kitchen/breakfast area will then be fitted with solid blocking every eight (8") inches to conform to the Ontario Building Code.

The repair process can commence within a few days after your written permission for access is received, and should incorporate approximately four (4) working days, however, as indicated at our meeting, accommodations will not be provided to you and your family for the duration of the repair.

If you do not agree with the above or feel that this does not accurately reflect the agreement discussed at our meeting, please advise this office, in writing within ten (10) days of receiving this letter.

Yours truly,

Bob Rosset
Conciliator
Brampton Regional Office

c.c. Roberto Homes Ltd.

Nijjor responded on July 5 again setting out his conditions and demands, and demanded further "A certificate by a certified structural engineer that the floor has been made to conform to the OBC and also he will be a member of the ABEO."

Mr. Steve Wheaton on behalf of the Program directed its final decision to Nijjor on July 22, 1991 which the appellant has refused to accept:

July 22, 1991

Ref: 9073/302601

Mr. & Mrs. Nijjor
83 Riverdale Ave.
Etobicoke, Ontario
M9V 2T8

Dear Mr. & Mrs. Nijjor,

I have completed my review of your file as it pertains to the re-inspection carried out June 5, 1991 by Mr. Rosset and Mr. Vandermey of the Ontario New Home Warranty Program.

It is my understanding that Mr. Rosset and Mr. Vandermey, as well as Mr. Maida of Roberto Homes, were in attendance at this re-inspection meeting. Also present were two tile experts, Mr. Mancini of Ceramica Tile and Mr. Pascali of Pascali Contracting. The following is the Warranty Program's decision based on your letter to Mr. Rosset dated July 5, 1991.

The Warranty Program does not require a structural engineer to provide confirmation of compliance with the Ontario Building Code in this instance. This can be determined by the Warranty Program's conciliators. However, you may wish to obtain an engineer's report at your own expense, or consult with the local Building Inspector.

Mr. Rosset's letter to you dated June 11, 1991 indicates that approximately 60 sq. ft. of tile is affected along the crown floor joist. The actual replacement area may vary in size. Mr. Rosset also indicated that the heating branch ducts located between the joist spaces will be dropped to a point just below the joist to accommodate the solid bridging between the joist. This practice will not greatly impact on your future consideration to

finish the ceiling, as the existing main plenum and cold air returns are dropped in the same manner.

It is the builder's responsibility to ensure that the replacement tiles are a reasonable match, and we see no reason why the builder could not provide you with a sample tile.

As indicated to you in the letter dated May 3, 1991 and June 11, 1991, it is not the policy of the Program to provide accommodations to families while repairs are being conducted within this residence. Furthermore, the Ontario New Home Warranty Plan does not give the Program the authority to use monies from the Guarantee Fund for this.

Of Mr. Nijjor's demands, the two which seemed to trouble him most are the refusal of the Program to pay for his accommodation during the estimated four days repair and a Certificate from a Certified Structural Engineer after the work is completed. This Tribunal must disallow both these claims since there is no statutory authority under which they can be allowed.

As far as the work is concerned, Mr. Maida, the builder, testified that it would take approximately four days and cost some \$3,000. We accept that figure and would add \$500 to cover the further work on the door.

There is, however, in our view some animosity between the parties which has arisen because the Applicant's demands have been rejected by both the builder and the Program. As a result, it may be desirable for the Program to settle these claims on a cash basis with the Applicant. The sum we would direct to be paid is \$3,500, but we leave this settlement at the option of the Program which may wish to have the work completed instead.

In conclusion, we find on the evidence that the work proposed to be done by the builder and the Program as set out in Mr. Rosset's letter of June 11, 1993 to the appellant is a satisfactory resolution of the claim.

The Program is, therefore, directed to complete the work on that basis or in its discretion pay to the Applicant, the sum of \$3,500 in full settlement of all his claims.

982681 ONTARIO LTD.
(GRIFFIN CONSTRUCTION)

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES;

ROBERT J. GRIFFIN, agent for the Applicant

MARY NEDOVICH, representing the Registrar under the
Ontario New Home Warranties Plan Act

DATE OF

HEARING: 6 October 1993

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal to revoke the registration of the Applicant upon the grounds that the past conduct of its officers or directors affords reasonable grounds for belief its undertakings will not be carried out in accordance with law and with integrity and honesty. The relevant facts are established by an Agreed Statement of Facts and Issues (Exhibit 4), certain other documents filed as exhibits and some oral evidence given by Mr. Robert Griffin as a witness on behalf of the Applicant.

Before outlining these facts and dealing with the issues to be determined here, the Tribunal wishes to make reference to a procedural issue which arose during the course of the hearing and set out the reason for the disposition made of it.

When the hearing proceeded, both parties closed their cases without calling any witnesses and, therefore, without any verbal evidence being given. Both parties filed certain documents as exhibits and indicated their intention to rely upon the facts established by these in presenting their argument. After counsel for the Program had completed her argument and Mr. Griffin addressed his argument to the Tribunal, it became apparent that there were additional relevant facts which the Tribunal did not have and which might well have a bearing upon the decision which must be reached. Counsel for the Program pointed out that reliance could not be placed upon information put forward in this way as there was no evidence of the same before the Tribunal and the

Tribunal thought it proper, particularly since the Applicant did not have Counsel at the hearing to protect its interests upon this, a technical legal point, to raise the question as to whether or not the hearing should be reopened, even at this late stage, to permit Mr. Griffin to go into the witness box and give the evidence properly under oath and subject to cross-examination so that it would be before the Tribunal and could be considered in making the disposition of the case. Counsel for the Program submitted that this should not be done at such a late stage, after the case had been closed and the argument on behalf of the Program completed and after the Tribunal had made it clear to Mr. Griffin that he must present whatever evidence he wished at the proper time, which he had obviously understood because, as a result, he had presented certain documents as Exhibits at that time.

While the Tribunal appreciates that it must be very careful about allowing a party to reopen a case after it is closed and the hearing moves on to another stage, as it had done here, nevertheless it believes that it should do so where the interests of justice appear to require it. The failure of Mr. Griffin to present the evidence in question when it should have been done was clearly a mistake on his part arising from his lack of understanding of his case and his not having counsel to assist him. Where, in the course of any dealings a party makes a mistake, which, if uncorrected, will result in disadvantage to him, the proper principle is that he should be allowed to correct the mistake and that the other party should not be allowed a windfall advantage because of the mistake. There is an exception to this principle where the circumstances are such that the other party innocently relied or acted upon the mistake in a way that it would be prejudiced if the correction were made later on. This exception has no application to the circumstances here. This general principle was laid down as the basis of a decision in the Supreme Court of Canada in Leepo Machine Products Limited vs. the Western Assurance Company of Canada et al {1973} S.C.R. 171 - per Laskin J. at p.185:

It appears to me that such a case (where an insurer was aware of a bona fide error by an insured in a report and still sought to enforce a literal application of the policy terms) would be one of attempting to take unconscionable advantage of an innocent mistake which a court would be entitled to rebuff.

The relevant facts, as they emerged from all of the evidence, are as follows:

In June 1977 Robert J. Griffin was the principal in a company Bradford Custom Homes Limited which received registration under the Ontario New Home Warranties Plan Act as a builder. On August 21, 1978, this company entered into a standard Vendor/Builder Agreement with the Program. Mr. Griffin himself was not a party to this Agreement as a guarantor or otherwise and had no obligations under it, although he did sign it as an officer of his company. The company bound itself to indemnify the Program for any costs it incurred as the result of failure of the company to meet its warranty obligations under the Ontario New Home Warranties Plan Act and further in paragraph 4.2, gave the following covenant:

(2) The Vendor shall diligently perform his obligations under each construction contract but in the event of his failure to do so, or in the event of his bankruptcy, the Vendor shall pay to the owner the amount of all damages for financial loss resulting therefrom and shall indemnify and hold harmless the Corporation and its insurers from any loss which they or any of them may suffer by reason of the Vendor's failure to pay such moneys.

In 1978, a claim was made by a house purchaser for warrantable deficiencies which resulted in a payment by the Program to remedy the same and an invoice from the Program to Bradford Custom Homes Limited on June 30, 1979 for \$2,075 for reimbursement pursuant to the Agreement. This sum was never paid and the registration of the company was revoked by the Program.

The Tribunal does not have any evidence as to what happened to the company. There is evidence that Mr. Griffin personally went into bankruptcy from which he was discharged on November 29, 1983. Paragraph 9 of the Agreed Statement of Facts and Issues states:

9. Robert Griffin concedes that he was a principal, officer and director of Bradford at the time the claim was received by the Warranty Program and repairs were carried out. He also concedes that Bradford was liable to indemnify the Warranty Program for repair costs but submits that the subsequent bankruptcy proceedings and the SCO Order declaring him a discharged bankrupt absolves him of that liability. The Warranty Program concedes that it could not pursue a civil action against either Bradford or Robert J. Griffin for recovery of the \$2,075.00 invoiced.

The Tribunal notes that it does not appear Mr. Griffin was ever personally liable to pay this indemnity to the Program so he need not rely upon the bankruptcy to relieve him of this. While, as aforementioned, we have no evidence of bankruptcy of the company or otherwise what became of it, the concession on the part of the Program that it could not pursue a civil action against it leads to the inference that it is either bankrupt or without assets.

On October 8, 1992, Mr. Griffin was a principal in the applicant company which made an application for registration with the Program. When the Program received this application, it made certain searches of its records and it then contacted Mr. Griffin to discuss the problems arising from the prior registration of his former company and the result of all this was a decision to grant the registration of the new company upon terms and conditions set out in the Program's letter to the Applicant of November 18, 1992 (Exhibit 7) in which the President/Registrar of the Program told him:

I refer to your application dated October 8, 1992 for Registration in the Ontario New Home Warranty Program.

I propose to make your Registration in the Program subject to the condition that, during the term of your registration you shall not, without prior written consent, have under construction or in inventory:

(i) more than 2 home(s) of any class at any time or

(ii) a condominium project of more than NIL unit(s)

I am prepared to grant your Registration under the Program if the foregoing condition is acceptable to you.

Please confirm your acceptance of the foregoing by signing and returning the duplicate copy of this letter.

Mr. Griffin accepted these terms and conditions and the registration was granted on that basis. Some additional requirements were placed upon the Applicant in another letter of December 8, 1992 (Exhibit 8) concerning inspections by the Program and Mr. Griffin accepted these as well and proceeded to find some buyers for houses he would build so that he could commence operations.

By April 1, 1993, he had two houses presold and was ready to start building so he contacted the Program to enrol these two houses as required. Then, for the first time, he was told there would be a further condition that the Applicant or he personally would have to pay the \$2,075 outstanding from the old debt of Bradford Custom Homes Limited before he would be allowed to proceed. He was very anxious to proceed with his two houses so he would not lose these transactions (perhaps with some liability for breach of contract as well) and, on the other hand, he said he really did not believe either he or his new company had any liability for the old debt. He was able to work out an arrangement with the Program so that he could get on with his two houses and neither party would give up or compromise whatever were the proper rights or obligations as between them. The Program agreed to confirm the Applicant's registration so that he could register the two homes and immediately issue a proposal to revoke the same and he agreed to post with the Program the sum of \$2,075 which he has done, as security for the payment of this debt if the Tribunal should find its payment should be a condition of the Applicant's registration.

The Program immediately issued this Proposal as it had indicated it would do and it is a hearing upon it which is now before the Tribunal. In her submissions to the Tribunal, counsel for the Program very fairly stated that the only facts upon which the Registrar was relying in support of his conclusion that the past conduct of Mr. Griffin provides reasonable grounds for belief that the Applicant will not carry on its undertakings in accordance with law and with honesty and integrity are the facts that he was an officer and director of the previous company which defaulted on its obligations and that he did not cause these to be met. Furthermore, counsel did not ask for an Order that the Registrar be directed to carry out his Proposal, but rather for an Order that a term or condition be imposed that the \$2,075 posted in trust with the Program be released to it and thereupon the Registrar be directed not to carry out his Proposal and the Applicant be left with its registration.

The single issue which the Tribunal must now determine is whether, upon all of the evidence, there was past conduct on the part of Mr. Griffin which affords the Registrar reasonable grounds for belief that the undertakings of the Applicant will not be carried on in accordance with law and with integrity and honesty. In answering this question, the Tribunal must keep the following points clearly in mind. Section 7 of the Act gives to the Registrar a discretionary decision for reaching his belief whether or not the applicant will carry on its undertakings with honesty and integrity. The discretion is given to the Registrar, not to the Tribunal. The Tribunal should only reverse the Registrar if it concludes he was in error in his conclusion. It is not sufficient

for the Tribunal to conclude simply that it would have come to the opposite conclusion (see Re: Brenner 19 CRAT SCO Decisions and Orders, p.58) This was a decision of the Divisional Court in appeal from this Tribunal in a case dealing with a Proposal to refuse registration of a motor vehicle salesman under the Motor Vehicle Dealers Act where the provision of the relevant sections was similar and the point the same as must be determined here. At page 60, Southey J. says:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the Tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under s.5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

For reasons following the circumstances of that case, the Divisional Court did not reverse the decision of the Tribunal but sent the matter back for a rehearing and said:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the

Registrar to refrain from carrying out his proposal.

It is also important to note that the stricture placed against the Applicant by the statute is not that a registration should not be granted to a company if there is an unpaid debt to the Program by one of its officers or directors or by another company of which such officer or director was also a director or officer or in which he was in some way a principal. In other words, the Registrar cannot use this proceeding simply as a method of trying to collect an unpaid debt of this kind. The stricture placed against a corporate applicant is that it should not receive its registration if the "past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity or honesty." So the registration should not be refused simply because the Program has not been paid. It should only be refused if the conduct of Mr. Griffin in dealing with the earlier problem leading to the \$2,075 debt is such as to lead a reasonable person to conclude that he is less than honest and lacks integrity. The fact is that he has broken no law in anything he has done and he stated very strongly in his evidence that he did not believe that he had engaged in any misconduct or conduct in which he should have to accept any criticism for being dishonest or for lacking integrity.

Counsel for the Program relied upon the decision of the Tribunal in the case of Norhome Developments Inc. (1986) CRAT 154. In this case, the principal officer of the Applicant, one John R. Newton, had been the principal in another company, Safari Developments Ltd. which had defaulted on a debt to the Program of \$38,677.96 paid for warranted repairs to some 33 houses. As conditions of granting registration to Norhome, the Registrar required:

- a) A cash payment of \$20,000.00 up front. This will be considered as the first instalment of the over \$38,000.00 owed to the Program.
- b) Security in the amount of \$20,000.00 (i.e. \$1,000.00 per unit) based on the number of units proposed for the upcoming twelve months. This is security normally required of all registrants who have had a history of claims experience with the Program.
- c) After the first year of registration, fifty percent of the security will be refunded and the remaining fifty percent will be retained and put towards the balance of money due to the Program.
- d) After the first year of registration, the matter will be reviewed and a decision will be made with respect to the remaining \$8,000.00.

The Tribunal upheld the Registrar and directed him to carry out his Proposal and in the course of its reasoning quoted the provisions of section 7(1)(c) of the Act:

7. (1) An applicant is entitled to registration by the Registrar except where,

.....

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or

(d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

and went on to say on page 156:

To protect the public trust, the legislation requires the Registrar to look behind the corporate veil and it is clear under these provisions that in the case of a corporation, the past conduct of its officers and directors may be taken into account in determining whether, to grant registration.

and on page 158:

No one argued that there is a legal obligation on either Norhome or Mr. Newton personally to indemnify the Program on behalf of Safari. But, as the Tribunal understands the argument of counsel for the Registrar, the failure to indemnify the Program with respect to the Safari claims shows a lack of integrity on the part of Mr. Newton. As counsel put it, Mr. Newton just "chose to walk away" from the corporate obligations. It is this past conduct of Mr. Newton to which the Registrar points in support of his Proposal.

and on page 159:

The Tribunal finds that during 1979 and 1980, when granted that Safari was in financial difficulty, Mr. Newton as principal officer and directing force of Safari did not conduct himself with integrity with respect to Safari's undertakings, and that the Registrar was not in error in concluding that the past conduct of Mr. Newton afforded reasonable grounds for belief that Norhome's undertakings will not be carried on in accordance with law and with integrity and honesty.

and on page 160:

If the Program pays for the repairs, it is incumbent upon the builder by the terms and conditions of registration that the builder indemnify the Program for these costs. The Tribunal finds that the large number of claims against Safari, even though some were of a minor nature, indicates that under Mr. Newton's control and directions, Norhome does not have sufficient technical competence consistently to perform the warranties under the Act.

Counsel quoted and relied specifically upon these passages in that judgement.

The first passage relied upon by counsel for the Registrar from page 156 is simply a statement of what must be done by the Registrar and the Tribunal to apply the statutory provisions - of what must be taken into account. The second passage from page 158 is the argument on behalf of the Registrar in the Norhome case and in this one. In the Norhome decision, the Tribunal follows this passage with a statement of the answer made to it by Norhome.

Counsel for Norhome on the other hand submitted that since there was no legal obligation on the part of Norhome or Mr. Newton to indemnify the Program, then there can be no lack of integrity on the part of Mr. Newton if he chose not to do so.

It is the Tribunal's view that the critical question here is one which must be determined in each case where it comes up upon the facts of that case. In the Norhome case, the Tribunal made a specific finding that Newton did not conduct himself with integrity (note the passage quoted from p.159). In the Norhome case, there were 33 claims, numerous breaches of warranty and a history of problems spread over a considerable period of time and also a serious question as to whether Norhome had sufficient technical competence to perform the warranties under the Act. In this case, the evidence is that there was only this one house built by Bradford which gave rise to any warranty claim, no other history of problems and no question of competency. On all of this evidence, the Tribunal cannot find that Mr. Griffin conducted himself with a lack of integrity or acted dishonestly.

The Tribunal had the advantage of observing Mr. Griffin in the witness box and hearing the vehemence with which he put forward both his evidence and his arguments and has no hesitation in accepting his sincerity in his position. There appears to have been no dishonest motivation on Mr. Griffin's part for any of his conduct herein and, therefore, the Tribunal must conclude that this conduct does not afford reasonable grounds for the Registrar's belief. The Applicant has therefore met the test laid down by Southey J. and the Tribunal must conclude that the Registrar was in error in his conclusion. In fairness to the Registrar, it should be added that the Tribunal had a considerably better and thorough exposition of the facts than were available to him.

Therefore, pursuant to the authority vested in it by Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program not to carry out its Proposal.

GEORGE AND KAYE NOLIS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
GERRY BEECH, Member
STEPHEN PUSTIL, Member

APPEARANCES:
GEORGE NOLIS, appearing on his own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 16 March 1993 Toronto

REASONS FOR DECISION AND ORDER

In a contract dated July 28, 1991, George and Kaye Nolis agreed to have Silver Shadow Custom Homes Ltd. ("the builder") construct a new home on their 10 acre parcel of land at the Vandorf Sideroad in the Town of Whitchurch/Stouffville.

The contract states: "The Builder will do all of the following work on the above house as per the blueprints provided up to the drywall stage including the following:", and thereafter follows explanations of areas of work under the headings: Site Preparation, Foundation, Framing, Windows and Exterior Doors, Roofing, Masonry, Electrical, Eavestrough, Painting, Staircases, Fireplaces, Drywall, Plumbing, Mechanical, and Basement.

The price of the contract is set at \$250,000, GST included and concludes with the statement

All of the above work is to the drywall stage only and we would be happy to quote or assist you at a later date with the completion work.

Finally payments to be made by Mr. and Mrs. Nolis are referred to as:

- A) The sum of \$25,000.00 upon signing of this contract.
- B) The sum of \$100,000.00 upon completion of the foundation.
- C) The sum of \$100,000.00 upon completion of the framing to the roof.
- D) The sum of \$25,000.00 upon completion of the drywall installation.

George Nolis ("Nolis") is appealing to this Tribunal from the decision letter of the Ontario New Home Warranty Program ("the Program") dated June 3, 1992 which states:

OBSERVATION:

The dwelling is partially completed up to the stage of drywall installation as specified in the contract. It is apparent you have withheld sufficient monies to complete these items listed on our Inspection Report dated February 10, 1992.

DECISION:

It is the decision of the Warranty Program that in keeping with the definition of a "builder" your contractor does not meet the requirements of Section 1(a) of the Ontario New Home Warranties Plan Act and we must deny your claim for financial loss.

REASON:

It is the opinion of the Warranty Program that your contractor did not undertake the performance of all the work and the supply of all the materials necessary to construct a completed home.

Nolis said that no claim was being advanced under either Section 14(1)(a) or 14(1)(b) of the Ontario New Home Warranties Plan Act, ("the Act") as compensation was being sought from the builder as part of a Civil Court claim. He wishes solely to have the Tribunal decide whether or not this house is properly warrantable under the Act so that he may have an eventual recourse

if his court action is successful and he is unable to collect funds upon it.

Section 1(a) of the Act is as follows:

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner.

Nolis said that he and Mrs. Nolis are both office workers and have no knowledge of building or of sub-contracting so they wanted a builder to provide a large enclosed home for the maximum price of \$300,000, and would have a second phase of construction to finish the home. Since they needed to sell their present home or increase a mortgage on it to be able to finish the new home, they wanted to be financially prudent and do only what they could afford to do.

They asked Robert Silver, President of the builder to quote on the second phase of their home but he abandoned the site and never did give them a quote. Nolis said that the first three payments as required under the contract had been made and a further \$50,000 was given without a receipt to Robert Silver, but the final payment of \$25,000 was not paid over as there was a further disagreement over the claim made for some \$17,000 for extras.

Nolis said that before the contract was signed, Robert Silver said the home was covered by the Program. Nolis noted that the contract states: "Purchaser to pay for Ontario New Home Warranty and builder is to arrange."

Nolis said that Robert Silver was uncertain as to coverage but reported that, after calling the Program's office, the home would be covered. Nolis did not pay any registration fee as the builder had left the site.

Nolis agreed that John Moffitt ("Moffitt"), a conciliator with the Program was very helpful and referred to Moffitt's inspection report of February 10, 1992 which was mailed out on February 21, 1992.

That report states:

This inspection was carried out to examine the status of the dwelling situated on Part Lot 15, Vandorf Sideroad in the Town of Whitchurch/Stouffville, ie: two storey

brick veneer, single family dwelling with block concrete foundation and attached three car garage.

- The dwelling had been completed on the interior up to the drywall taping and sanding stage. The second storey was completely taped and sanded; no paint primer had been applied. The ground floor had not been completely taped.

- All the framing and subfloors were in place and all the debris had been swept out and placed in the garage.

- Normal access to the basement and the second storey was not possible as no stairs had been installed.

- Rough-in electrical wiring was in place (many pot lights installed).

- Rough-in plumbing was in place.

- Rough-in fireplaces contained metal fireplace inserts (except the basement).

- Other rough-in items in the contract were not checked.

- The water supply system is in place; no plumbing fixtures have been installed except the bathtubs.

- Windows and exterior doors are in place.

- Heating units are running in the basement, but are not hooked up to any duct work. The main heating plenums and supply ducts are not yet in place.

- Basement insulation and vapour barriers are in place.

- The aluminum fascia, soffit and eavestrough have not been installed.

- Planters are complete. The foundation and forms are in place in preparation for the front entrance steps.

- Garage doors are in place.

Generally speaking, this dwelling falls short at this time of being ready for occupancy. Many items are still required to be completed before an occupancy permit could be issued by the Municipality.

We note that the contract (page 6) did not call for the undertaking of a completed home and in this regard we refer to Section 1(a) of the Act, which defines a "builder", for the purpose of deciding whether this home should be covered by the warranty.

In Moffitt's letter of February 13, 1992, he wrote:

...Your claim for breach of contract would be made under Section 14(1)(a) of the Act (see enclosed) and our limit of liability is \$20,000.00. There does not appear to be any claim under Section 14(1)(b) (Breach of Warranty) as this covers defects in work carried out by the builder and none are apparent at this time. Since the dwelling is substantially complete and it may be some time before you actually move in the Program will use May 1, 1992 as a commencement date for the warranty.

We find the home has been enroled and the number is indicated above.

Then Moffitt wrote in a letter of February 21, 1992:

At this time, it is our understanding that your builder is intending to proceed through the courts to retrieve certain monies that he claims are owed to him. This situation prevents the Ontario New Home Warranty Program from taking further action if a decision by a higher court is pending.

The Warranty Program has assigned the enrolment number on a pending basis until the completion of our investigation.

Please find enclosed a copy of the

report for the inspection of February 10, 1992.

Nolis said that Moffitt's comments at the time of the inspection and otherwise led them to believe that registration was all but certain, that contract homes such as theirs were ordinarily registered and that they would be covered under the Act. Therefore, Nolis said that the Program through Moffitt had really held his home to be warranted between February 13 and the uncertainty of the report mailed out with the letter of February 21.

Moffitt then wrote a letter on March 13, 1992 as follows:

Further to your telephone call of March 9, 1992 we have considered the situation involving the above proposed dwelling.

Since Silver Shadow Custom Homes Ltd. did not undertake the performance of all of the work and supply all of the materials necessary to construct a complete home it would not be necessary for the dwelling to be enroled under the Act. This is clearly defined in Section 1(a) of the Act and also contained in the wording of your contract with Silver Shadow Homes.

As it stands we are unable to place the warranty coverage on this structure at this time as we believe it to be ineligible, you may find a better resolution by proceeding to arbitration see section 17(4) page 9.

That conclusion was put into the formal decision letter of June 3, 1992 quoted above.

Nolis set out in his letter to the Program of June 12, 1992, the reasons for this appeal to be as follows:

We are appealing the decision of June 3, 1992 from Mike E. Cote, Regional Manager, Newmarket Office. We are seeking registration and approval for warranty coverage. Please note that:

. We have not made a claim for financial loss. In fact, we are negotiating with the builder to complete his work.

. The dwelling is not completed as specified in contract and current estimates are that completion may range from the \$80,00 - \$112,000; therefore, the comment under "observation" is neither correct or warranted.

. We did contract with a builder who is registered and assured us of our coverage, as it's clearly indicated in the contract.

. Section 13(2) of the Act implies that the Act envisaged the owner doing some of the work as it specifically provides that the warranty is not applicable to defects in material, design and workmanship supplied by the owner.

. Our contract clearly indicates that we are the purchaser and Silver Shadow is the builder, who was required to provide all the materials and labour. The act does not define what a complete home is; and, regardless of this, the contract provides opportunity for Silver Shadow Homes to complete the finishings. The builder was given the opportunity to do so.

. We were informed by letter on February 13, 1992 that our home was covered as of May 1, 1992. Subsequently, for reasons that were not made known to us, Mr. John Moffitt changed his opinion. Please note that the inspection was done on February 10, 1992, and Mr. Moffitt, on this date, was provided with a copy of the contract and architectural plans; therefore, the change of the decision is prejudicial, as no new information has been provided.

Nolis said that the term "completed home" is not defined and that the Act contemplates an owner doing some work as such work is excluded by warranty under Section 13(2) (a).

On cross-examination, Nolis agreed that he had obtained the Building Permit and other approvals and that the original plans drawn for him were later scaled down to affordable size.

Counsel for the Program reviewed with Nolis the letter which Nolis's than solicitor had sent to the Program on April 21,

1992 and which, after referring to the several letters of Mr. Moffitt stated that the home should qualify for enrolment for two reasons:

1. You have relied upon Section 1(a) of the Act, which defines a builder as someone who has contracted for a "completed home". There is no definition of the term "completed home" in the Act. Upon any reasonable interpretation of those words, we believe that our client has in fact contracted for a "completed home". Virtually all of the things necessary to construct a building for purposes of residing therein are included in the contract up to the stage of primary painting of drywalling. The matters left to our clients for moving into their new home are quite minor compared to the amount of work which Silver Shadow Homes has contracted to complete. The intention of the contract is to construct a building for dwelling purposes and on any reasonable interpretation therefore constitutes a "completed home".
2. Your letter of February 13, 1992 confirms that the home has been properly enrolled under the Program and is therefore entitled to its benefit. Any subsequent limitation attempted to be placed on this statement by the Program is self-serving, and in our opinion, of no legal effect. We have reviewed the Act and its regulations and we see no provision in which the Program is entitled to withdraw enrollment of a new home once enrollment has been granted.

Counsel for the Program then reviewed various uncompleted matters with Nolis who agreed that there were no interior lights or fixtures provided; that he presumed the stair railings and pickets would be included with the staircases; that Nolis was to provide all the sinks and toilets; that a furnace was not hooked up to the ducts; that floor coverings, kitchen cabinets, bathroom vanities, interior trim and painting, and internal doors were not included in the contract.

Nolis agreed that as of February 10, 1992, he could not have obtained an Occupancy Permit for this home as there were no

sanitary plumbing fixtures in place, nor were there any electrical plugs or switches or a functional kitchen.

Mrs. Kaye Nolis said that she and her husband George met often with Robert Silver to discuss and plan their "dream home". She said that the revised plan for the home continued to be expensive, and she relied on Moffitt's comments that their home was enrolled and protected under the Program. She said that the extra sum of \$50,000 in cash was paid to Robert Silver so that they had already paid \$275,000 for a home with much work still to be done. On cross-examination, she said that the present home was 4,700 square feet and that it would take \$100,000 to complete the home.

John Moffitt ("Moffitt") was the Program's conciliator who became responsible for this claim as he was familiar with the problems which can arise from "contract homes". He said that he received the initial complaint of January 30, 1992 and found that the home was not enrolled in the Program. A file number was assigned to the file which did not mean that the home was in fact enrolled, he said. He reviewed his inspection report and the letters referred to above and his conclusion that the home could not be enrolled since a "completed home" was not being provided by the builder. Moffitt provided 27 photographs to the Tribunal to show the state of the home as at his visit of February 10, 1992. In his opinion, the \$25,000 final payment of the contract would be sufficient to finish the home to the "drywall stage". Moffitt stated that this home was certainly not completed in any sense of the word and that no Occupancy Certificate could have been obtained for persons to live there. He said that this home could now be enrolled in the Program if a builder was prepared to enter into a contract to provide a fully finished and complete home, and assume responsibility for all work done so far, and if the necessary enrollment fees were also paid.

Robert Silver is the President of the builder and over his six years of experience has constructed 12 homes. Nearly all of these were contract homes built for persons who own their own lots. He reviewed the contract and confirmed that building to the "drywall stage" did not provide a completed home.

He said that among the items which were not included and which would be necessary for a "completed home" were:

- Interior electrical outlets and switches
- Pickets and railings for the staircases and 2nd floor bridge
- Fireplace vents
- All plumbing fixtures
- Heating plenums
- Floor coverings of wood, tile or carpet
- Painting

Kitchen cabinets and vanities
Interior doors

He spoke of various items as extras which were included in his claim for \$17,000, and denied receiving any payment of \$50,000 in cash from Nolis. He said that the house could not be enrolled since a Certificate of Completion and Possession could not then have been issued for a home at the "drywall stage". He denied that he told Nolis of a call to the Program which confirmed that the house could be enrolled. Silver said that \$200,000 could be spent to complete this home.

In conclusion, Nolis confirmed his request for the home to be enrolled in the Program so as to protect him and his wife if they are successful in their civil claim against the builder and cannot collect thereon. As the builder was registered, and their two-phase construction plan was prudent they believe the Program should enroll the home. Since all plans and the contract were made readily available to the Program and Moffitt's letters led them to believe they were covered at one time, then the Program should accept his opinions and earlier comments and be bound by them, he said.

Since the term "completed home" is not defined in the Act, Nolis advances the opinion of his former solicitor referred to earlier and maintains the conclusions in his letter of June 12, 1992.

Nolis referred the Tribunal to the decision of John Laudone (1991) 22 CRAT 786 where the owner was to do the plumbing and electrical work in his own contract home. The list of outstanding claims was decided upon by that Tribunal panel of which some were allowed. The Tribunal did say that the items did not require any interpretation of the contract, but were capable of being resolved on a clear reading of the contract. Apparently that contract was for a completed home except for the work the owner was particularly to do.

Counsel for the Program noted that Nolis had applied for the Building Permit for this home and for other approvals, and had the initial plans prepared which were then scaled down. As the contract was clear that the builder was only to do work to the "drywall stage", counsel says that under no stretch of anyone's imagination could the home be considered to be completed and that enrollment could not occur under the Act. For him, the photographs provided by Moffitt clearly show that the home could not be occupied and by Mrs. Nolis's own evidence, it will take \$100,000 to finish the home. Therefore he entirely rejects the opinion of Nolis's former lawyer that the home fits the definition in Section 1(a) of the Act.

While there may be some confusion from the comments made by Moffitt and from certain references in his letters, counsel said that the Tribunal should follow the principles laid out in the decision of Duncan Wrighte (1991) 22 CRAT 1013 where the majority accepted the view advanced by the Program's witness at page 1015 that:

In any event, the only liability to any purchaser by the Program must be imposed by the Ontario New Home Warranties Plan Act or by Regulations made under it. If there is such a liability imposed in a given case, the fact that someone in one of its offices might tell a purchaser there was no coverage would not negate the coverage. Likewise, if there is no such liability, the fact that someone in one of its offices said that there was certain coverage would not impose this liability or create the coverage.

This opinion was also accepted in the decision of John W. Crate (1991) 22 CRAT 604, where the Tribunal noted:

...This problem which I have just outlined arises in every case where a builder enters into a contract to sell a home to be built and that is the reason that the last clause was added to the definition "and includes a builder who constructs a home under a contract with the owner". It is pursuant to this clause that the normal purchaser of a house to be built gets warranty coverage under the Act. Unfortunately, the Applicant was not such a normal purchaser. To get within this provision, Sun-Spec must be found to be a "builder" within the meaning of Section 1(a) of the Act.

- 1(a) "builder" means a person who undertakes the performance of all the work, the supply of all the material necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

Sun-Spec Design-Build Corporation is clearly a person within the meaning of the word as used here, but it did not undertake the performance of all of the work or the supply of all of the materials necessary to construct a completed home. In determining this issue, however, it must be taken into account that the practice of the Program, which is supported by common sense, is that the performance of relatively small amounts of work or the supply of relatively small amounts of material by the owner or by some third party will not take the home out of the definition and vitiate the warranty. The question is how extensive can these contributions be before they take the home out of the definition.

The Tribunal was told at the hearing that the Program has a general rule of thumb to the effect that the undertaking of the builder must include the services - plumbing, heating, electrical, etc. In this case, the undertaking of Sun-Spec did not include these services and in looking at the total picture, the Tribunal must come to the conclusion that the contribution undertaken by the Applicant in this contract, both as to the work to be performed and as to material to be supplied, was so extensive that Sun-Spec was not a builder who undertook all of the work and supplied all of the material to construct a completed home.

The Applicant stressed the fact that the home was enroled by Sun-Spec, that he paid the fee to the builder, that a certificate was issued purporting to provide him with a warranty and that, up to a certain time the Program believed that he was covered. However,

failure to enrol a home or pay the fee on the part of a builder does not deprive an owner of coverage if he is otherwise entitled to the same and, likewise, the enrolment of a home not qualified does not render the Program liable.

The Tribunal has considered the evidence and concludes that here the builder Silver Shadow Custom Homes Ltd. did not in the contract of July 28, 1991 "undertake the performance of all the work and supply of all the materials necessary to construct a completed home."

As shown by the words which we have underlined, we find the photographs of Moffitt and the evidence of both Mrs. Nolis and Robert Silver result in the conclusion that this contract in no way resulted in a completed home for which an Occupancy Permit could be immediately obtained and where a Certificate of Completion and Possession could have been signed by both builder and owners.

While the word "home" is defined in the Act, our view of the phrase "completed home" must depend upon the evidence before us and on common sense.

Accordingly, by virtue of the authority vested in the Commercial Registration Appeal Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

ALDO AND ELVIRA PIO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
GERRY BEECH, Member
HANS G. KEPPLER, Member

APPEARANCES:

ALDO AND ELVIRA PIO, appearing on their own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

COREY LIBFELD, representing Via D'oro Developments Inc.

DATE OF

HEARING: 22 March 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program given in a letter dated July 28, 1992 from the Program to the Applicants advising that their claims regarding the ceramic tile installed on the main floor of their home could not be covered by the warranties provided in the Ontario New Home Warranties Plan Act.

The Applicants purchased their new home from a builder Via D'oro Developments Ltd. being a premises at 71 Fifefield Drive in Maple, Ontario. The transaction was closed on February 8, 1991. An inspection was made of the home at that home and a Certificate of Completion and Possession was made out listing seven numbered complaints, none of which included the only item of complaint which was in issue at this hearing before the Tribunal.

The only item of complaint with which we are concerned here is the complaint concerning the ceramic tile on the main floor of the house. On this floor, the main hallway or foyer, the kitchen, the dinette, the laundry room and a bathroom were finished with ceramic tile floors, the tiles being described as 10" x 10" white plain ceramic tiles. It is of some note that, while there is no complaint concerning the tiles as a result of this inspection at

the time of closing, there is an item that the homeowner would like another coat of varnish on the wooden floors and on the staircase. Mr. Pio said that the reasons that he and his wife did not notice the problems with the tiles at that time were that he was much more concerned with part of the basement floor which had caved in, that a good part of the ceramic tile floors in question were covered with paper at that time and that the reference to the extra coat of varnish on the wooden floors and staircase was there because the builder's representative who was present at the inspection pointed this out and suggested that this item be included in the Certificate.

On March 7, 1991, Mrs. Pio wrote to the builder enclosing a copy of the Certificate of Completion and Possession aforementioned and referred specifically to five listed items of complaint, still none of which included any complaint concerning these ceramic tiles.

It was not until August 2, 1991 that the Applicants wrote to the builder with a copy to the Program (thus giving it notice) and first made a complaint as to these tiles. Item 4 in that letter reads:

4. The tiles on the main floor are in poor condition. The tiles are discoloured. The tiles should be white, yet the tiles are spotted with grey and some tiles are grey. Tiles have already started to crack.

Mr. Pio gave evidence as to the Applicants' complaints concerning these tiles and filed a number of photographs he had taken of them. He said that the tiles were discoloured, turning grey and many of them exhibited grey patches or blotches. Also many of them showed pin holes and, in the corners, holes a little larger than pin holes. He said that almost the whole of these tile floors showed discolouring and blotching and perhaps 5% of the tiles have either pin holes or larger holes in the corners or both. He described all of the holes as being round holes which "pop" the glazing.

Mr. Pio said that they first noticed the discolouration or blotches in May 1991 and at that time they noticed one cracked tile. They also first noticed the holes at that time as well. He said that in the areas where there is more traffic, there is more discolouration and blotching and as time has gone on, there have appeared more and more holes. He said that his wife washes these floors approximately every week and the washing tends to make the defects more apparent.

As a result of these complaints, the builder arranged for a representative of Olympia Tile International Inc., the supplier of the tiles and of Rockford Tiles, the company which laid the tiles, to attend and inspect these floors. The results of this was that all three of these parties made, jointly, an offer to the Applicants to replace 20 of the tiles, being the cracked one and the most noticeably discoloured tiles, but the Applicants refused because they wanted the whole of these ceramic tiles on the main floor replaced. As mentioned above, Mr. Pio presented some photographs which he had taken. Unfortunately, most of these photographs are not of as much assistance as they might have been because the colour of the tiles did not come through properly, but show a yellowish brown unnatural colour. They do show the cracked tile and what must be described as not very substantial discolouration and some evidence of small round holes.

Mr. Pio also presented a letter, a copy of which is Exhibit 8 from another tile company signed by one T. Ascenzi which states that the writer was asked to inspect these tile floors and that he found them defective. It is stated in the letter that 90% of the tiles were improperly glazed and that the installation was unacceptable by that Company's standards and should be replaced. Mr. Ascenzi was not called as a witness.

Four witnesses gave evidence in support of the Program's case. The first was Mr. Richard Fowke, at the time a conciliator and now a technical representative employed by the Program. He was present at a conciliation meeting and inspection which took place at the premises on May 7, 1992 with Mr. and Mrs. Pio, Tony Ascenzi, who wrote the letter aforementioned and Corey Libfeld, representing the builder. The complaint concerning the tile was addressed in a Schedule "A(2)" which Mr. Fowke prepared in the following terms:

Complaint:

Floor tiles discoloured and chipped

Observation:

The homeowner indicated the ceramic floor tiles installed by the builder in the front entry foyer, main hall and kitchen. The floor tiles had been installed on a 3/4" to 1" thick mortar bed with wire mesh installed. The tile was generally acceptable except some tiles had minor pin holes over approximately 2% of the surface face and minor variations in colour. The builder presented a letter from the supplier, Olympia Tile, indicating that the tiles in question were mostly acceptable and offered to replace 20 ceramic floor tiles as a goodwill gesture.

Comments:

The ceramic floor tiles installed in this home conform to all the requirements of the C.A.N./C.G.S.B.-75.1-M88 standard, which governs ceramic tile in the Ontario Building Code. This item is not warrantable. The supplier's offer of the replacement of 20 ceramic floor tiles is, therefore, regarded as acceptable.

Mr. Fowke said that when he was inspecting the tile floors in question, Mr. Pio pointed out certain tiles to him and he observed the pin holes and what he described as fairly minor greyish blotches on the tiles. He said that the pin holes and the greyish blotches were to be seen in approximately 2% of the floor surfaces which he said were well within the allowable tolerance of 5% set out in what is the accepted standard for this purpose, being Section 5.2.1 of a Canadian/CGSB-75-M88 (which he said was accepted as the proper standard under the Ontario Building Code). A copy of this document is found in tab 9 of Exhibit 6 and reads:

The tile shall be free from blots, biscuit cracks and laminations. At least 95% of the tile shall be straight and true in shape and free from objectionable surface blemishes, spots, biscuit chips, shivered edges, welts, dry spots, sand, scum and stickers, visible at a distance of more than one metre. The remaining 5% of the tile shall be structurally sound, free from dry spots, cracks, laminations and shivered edges and have only minor visual surface blemishes.

Mr. Fowke strongly disagreed with the figure of 90% mentioned in the letter aforementioned from Mr. Ascenzi. The Tribunal had the benefit of observing Mr. Fowke give his evidence on this point and prefers the same to that of the letter from the witness who was not called and finds that Mr. Fowke's description of the extent of both the discolouration and of the pin holes should be accepted.

Mr. Fowke went on to say that he did not see the blemishes on the tiles until they were pointed out to him, that he did not see the cracked tile during this inspection nor was it pointed out to him and that all of the complaints which he did see were well within the 5% allowable tolerance.

Finally as a result of the continued complaints of the Applicants, Mr. Fowke attended with another officer of the Program

Don Straiko, on June 17, 1992 for a re-inspection and second opinion and his findings and opinion on that occasion are set out in a Schedule "A(2)" resulting from it as follows:

Complaint:

Floor tiles discoloured and chipped.

Observation:

Approximately 8 ceramic floor tiles with blemishes and 5 chipped tiles were evident in the floors of the foyer, main hall, powder room, kitchen, and breakfast area, the blemishes were minor in nature and met the requirements of the Canadian General Standards Board specification CAN/CGSB-75.1-M88. The tile supplier has inspected the floor and indicated in their letter of Mar. 27, 1992 that the tiles were acceptable but has offered to replace twenty tiles as a goodwill gesture although obtaining an exact colour match may prove difficult.

Comments:

The installation of the ceramic tile floor conformed to all requirements of the Ontario Building Code. The blemished tiles conformed to applicable standards. The chipped tiles were not noted on the Certificate of Completion and Possession making it impossible to determine responsibility. The builder's offer to replace twenty tiles is regarded as acceptable and they are requested to supply three different dye lots of the same colour tile to the homeowner who should confirm their selection to the builder in writing.

The next witness on behalf of the Program was Daniel Amar, Manager of the Quality Control and Adjustment Department of Olympia Tile International Inc. He has been with that company for twenty-four years and held his present position for ten years and he appeared to be very experienced and knowledgeable in this business. He attended at the premises on January 8, 1992, together with Mr. Fabris of the Rockford Tile Company which laid the tile and they looked at all of these floors in question in the presence of Mr. and Mrs. Pio. He said that Mr. Pio's complaints to him at that time were only as to the colour or discolouration of the tiles. Mr. Amar said that they were "white tiles" which are not a pure or dead white, but which are to some extent an off white. Mr. Amar said that insofar as the colouring was concerned, these tiles were exactly what they were supposed to be and quite within the

proper standards which are those described above.

He also said that the pin holes were within tolerance standards. They are caused by small particles of dust which get on the surface when the tiles go into the kiln for glazing. There are always some of these present because in carrying out this process, it is not practical to eliminate all dust particles from the air.

There had been a suggestion in the Applicant's evidence that water from the washing of the floors or otherwise might have got under the glazing or into the tiles in some way to increase their discolouration, but Mr. Amar said that this was impossible once the glazing was complete. There had also been an allegation made in the Applicant's evidence that the tiles used here had been "seconds". Mr. Amar denied this categorically. He said they were first quality tiles and exactly what was specified and required. In one of the pictures aforementioned, Mr. Amar noted there was a manufacturer's defect and it was a tile which they would have replaced. He looked at the cracked tile and said the cracks went out in several directions from a point which showed it was a crack caused by an impact of some blow at that point after the tile was installed. He also looked at the chips from the edges of tiles which were pointed out to him and said that these were done after the glazing because they were not covered with glaze which they would have been if it had been done before. Commenting on the letter from Mr. Ascenzi he said that he completely disagreed with what was set out there, that Mr. Ascenzi does not have the knowledge required to deal properly with this matter and that the floors were within the acceptable standards as aforementioned.

Again the Tribunal accepts the evidence of the witness who came before it to that contained in the letter from Mr. Ascenzi.

Finally, Mr. Amar said that there was no question of any improper workmanship here on the part of Rockford Tile Company in laying the tiles. He said that Rockford had done a perfectly proper job.

The next witness was Marco Farbis, the foreman for Rockford Tiles which laid the tiles. He had been with the company eleven years and foreman for three years and in the business of putting down ceramic tile floors since 1969. He also appeared experienced and competent. He was present at the two inspections made of these floors on January 8 and March 25, 1992 together with Mr. Amar. He said that Mr. Pio was complaining of the colour of the tiles and also of the pin holes. He said the pin holes were well within the acceptable standards of tolerance aforementioned and he said that to see the discolouration of which the owners were complaining, he had to stoop or kneel down - one could not see

these when fully standing. He was also emphatic that all of the tiles used were of first quality.

The fourth witness for the Program was Mr. Corey Libman, Custom Service Manager of Via D'oro Developments Inc., the builder. He was present during the second inspection. He said that the grey markings which the owner pointed were supposed to look as they did - that was the way the tiles were made. He also said that one could not see these markings when walking uprightly, but only if one got down close to them. He did not remember if the cracked tile was pointed out to him.

Upon all of this evidence, the Tribunal must find with regard to these ceramic tiles in question that there is no breach of warranty to bring the claim within Section 13(1) of the Ontario New Home Warranties Plan Act. These floors were constructed in a workmanlike manner and are free from defects in material. We find that the existence of the pin holes and of some variation in colour are all well within the accepted standards of tolerance as set out and discussed above. Also these floors were constructed in accordance with the Ontario Building Code which adopts and follows the technical standards set out above.

Therefore by reason of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

RICHARD POONAH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:
JAMES WHEELER, representing the Applicant

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 19 April 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a decision letter dated December 5, 1991 sent to the Applicant. The Applicant entered into an Agreement of Purchase and Sale on July 7, 1986 to purchase a new home from a vendor/builder Heritage Classic Homes Inc. to be built on premises which came to be known municipally as 4464 Weymouth Commons Crescent in Mississauga. We have a Certificate of Completion and Possession at tab 5 of Exhibit 4 which gives the date upon which the Applicant took possession as January 30, 1987 and it would appear that the times limited by the Ontario New Home Warranty Plan Act for making claims in writing to the Program began to run from that date. The only complaint or defect in the home with which we are concerned at this hearing is a defect in the brickwork forming all four outside walls of the house. In the decision letter aforementioned, the findings of the Program's officer who inspected the brickwork are set out in the following terms:

At the inspection, Mr. Vandermey looked at the brickwork on all four sides of your home. Mr. Vandermey has advised me that the brickwork on your home is considered to be of poor quality workmanship and

materials. The brick overhang varies from the foundation, from 1/2" sticking over the foundation to approximately 1.1/2", which is considered to be poor quality workmanship, and that the walls are wavy from one end of the home to the other. Mr. Vandermey indicates that the mortar is very easily removable by using your finger and/or a small stick. Mr. Vandermey has also indicated to me that the width of the mortar joints are also deemed to be poor in workmanship standards.

Photographs of this brickwork filed as exhibits and other evidence which we heard corroborated these findings that the brick veneer walls which enclose this house were constructed and left by the builder in a condition which clearly constituted a breach of the vendor's warranty provided by Section 13(1)(a) of the Act.

Two issues, however, remain to be determined by the Tribunal:

1. Whether notice in writing of a claim for this defect was provided to the Program within one year as required by Section 13(4) of the Act and Section 4(1) of Regulation 726 made thereunder?
2. Does the defect constitute a major structural defect within the meaning of Section 1(o) of the said Regulation 726 so that the notice and proof of claim which was submitted on September 27, 1991 brings the Applicant within the time limited for making such claims by Section 14(1)(c) of the Act?

There are a number of defects listed in the Certificate of Completion and Possession, but complaint as to this brickwork is not one of them. On March 15, 1987, the Applicant sent a letter to the builder with 20 listed complaints with a copy to the Program (thus giving it notice and it received the same on March 25, 1987). Again there is no reference to any complaint concerning the brickwork. It is important to note that in a letter to the Applicant dated March 30, 1987, acknowledging receipt of the aforementioned letter, it was clearly brought to the attention of the Applicant that claims other than major structural defects must be submitted in writing within one year by the words "You have acted promptly by notifying the Warranty Program of your complaints, since they must be submitted in writing prior to the first year anniversary of your purchasing your home if we are to assist you."

On November 12, 1987, the solicitor for the Applicant sent a letter to the builder with a list of 23 complaints, numbers 5, 6 and 7 thereon being:

5. Bricks cracked in several areas
6. Row of bricks on the edge of window coming out
7. Block laid improperly between the garage

On the same day, the solicitor wrote to the Program asking for its intervention and enclosing a copy of the letter forwarded to the builder. It was stated by Mr. Bruce Stevens, a technical representative of the Program, who gave evidence before us that the Program did receive a copy of the Schedule as well with the 23 complaints, because the Program's records show that this was received by it on December 9, 1987. Efforts were made to have the builder remedy the defects, but these were successful only with regard to some of the defects and not with regard to others and on February 7, 1988 the Applicant made a formal request for conciliation, listing 18 items of dispute, none of them making any reference to the defective brick veneer walls of the house.

This conciliation took place on April 20, 1988 and a report with a Schedule "A(1)" covering items found to be warranted and a Schedule "A(2)" covering items found not to be warranted was issued. For the first time, we have an unequivocal reference herein to the complaint or defects with which we are concerned at this hearing. The third complaint discussed in Schedule "A(2)" found at tab 7 of Exhibit 4 reads:

COMPLAINT - Poor exterior brick work.

OBSERVATION - The brick veneer along the south elevation is bellied out in two different locations just above the foundation and approximately half way up the wall.

COMMENT - The Homeowner indicated that he had discussed this problem earlier with the Builder but had not submitted anything in writing. The representative said he would take the matter up with the Builder and get back to the Homeowner.

NOTE - The remaining items from the request for conciliation form and the Homeowner's letter dated February 7, 1988 have been satisfactorily completed by the builder.

The fourth complaint listed in that Schedule concerns the blocks improperly laid between the garage and the house and is

found not to be warranted because the wall was found to be structurally sound and to pose no problem.

In order to succeed on the first basis put forward by his counsel, the Applicant must obtain a finding that the words used in the Schedule attached to the November 12, 1987 letter to the builder of which the Program acknowledges having received a copy on December 9, 1987 are sufficient to make out notice of or a complaint of the defect which is the subject matter of the claim here. We included the reference in the Schedule "A(2)" above to the fourth complaint to show that it disposes of Item 7 in that list for this purpose and we are left with Items 5 and 6.

There is some other evidence which throws some light on this question. As a result of complaints made by the owner to the City of Mississauga Building Department, an inspection was made by that Department on July 21, 1989 resulting in the issue of a Work Order on August 11, 1989 requiring the following:

The compressive strength of the Mortar does appear to be weak and should be certified by an Engineer.

Corbelling at the base of the wall around the dwelling exceed the allowable.

Space of weep holes above garage door and window are not adequate and should be remedy.

Mortar Joint thickness do not meet the Ontario Building Code.

It is to be noted that none of the defects addressed in this Order come within the description of the complaints in either Items 5 or 6 of the aforementioned Schedule. The evidence also indicated that, in response to the initial complaints, the builder did come back and do certain remedial work and that, on the copy of the Schedule with the 23 items found at tab 3 of Exhibit 4, someone has written "done" opposite Items 5 and 6. The fact that there is no reference to these items in the next list of complaints from the owner being the list in the request for conciliation on February 7, 1988 with 17 specific items would lead to the conclusion that the matter of which complaint was made in November or December 1987 had, in fact, been remedied and that the complaint of "Poor exterior brick work" pointed out verbally during the conciliation on April 20, 1988 was not considered to be the same thing. This conclusion is also corroborated by other things. The description of the condition of these brick walls as set out in the decision letter quoted above, in the evidence of various witnesses who

described these walls and in the photographs filed make no reference to and give no indication of cracked bricks and no indication of any row of bricks on the edge of a window coming out. Also the fact that, while the Applicant took a considerable number of steps over a considerable period of time to follow up on the various complaints which he had made from time to time, he did nothing whatever to follow up on these Items 5 and 6 in the Schedule of November 12, 1987 until the complaint which he made to the representative of the Program at the conciliation meeting on April 20, 1988. All of this had the result that the Program never addressed this complaint in any way until that time.

Upon all of the evidence, the Tribunal finds that the complaints made in Items 5 and 6 of the Schedule forwarded on November 12, 1987 were not intended by the Applicant or taken by the Program to refer to this poor quality workmanship and materials in the brickwork on all four sides of the house and, in fact, did not do so.

The Tribunal must, therefore, find that the complaint of the defect with which we are dealing at this hearing was not reported within the time limited by Section 13(4) of the Act and does not bring the claim within the warranty provided by Section 13(1)(a).

There remains the question of the claim succeeding as being one based upon a major structural defect. In his Proof of Claim filed on September 27, 1991 in paragraph 3 thereof, the Applicant identifies his claim as being one of a major structural defect and the inspection of his home on November 1, 1991, the decision letter of December 5, 1991, and much of the defence at this hearing dealt with the claim on this basis. We have the evidence of Mr. Tibor Pal, a Civil Engineer, who specialized in construction engineering and who inspected these walls for the Program who stated that he is familiar with the definition in the Regulations of a major structural defect and that these defects in the brick veneer walls of this home do not constitute such major structural defect. He did find the defects described in the decision letter, but none of these resulted in any failure of a load-bearing portion of the building or materially and adversely affected its load-bearing functions or otherwise came within the definition set out in Section 1(o) of the Regulation aforementioned.

The Tribunal has clearly and unequivocally held in previous decisions that defects in brick veneer walls and houses do not constitute major structural defects. (See Angelo Proestos case (1992) CRAT released May 6, 1992. At the bottom of page 11:

The Tribunal also observes that the claim of Mr. Proestos would not constitute a major structural defect since masonry veneer is specifically excluded as a load-bearing element in section 4.4.6.1(3) of the Ontario Building Code. The New Home Warranties Plan Act specifically states that a major structural defect means any defect in workmanship or materials "that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function".

Masonry veneer brick walls do not constitute, therefore, a major structural element in the home.

Upon the facts established by the Applicant here and in particular the findings of Mr. Vandermeij as set out in the second paragraph of the decision letter of December 5, 1991 and the evidence of Mr. Pal, it should be pointed out that the Applicant may have good claims against other parties. However, this is a question upon which he should obtain proper advice. The Tribunal at this hearing, is confined to adjudicating upon the rights and obligations between the parties hereto, the Applicant and the Program.

As a result of the conclusions reached above, the Tribunal therefore, pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, hereby directs the Ontario New Home Warranty Program to disallow this claim.

MARTIN RAMSAROOP AND SYLVIA JAGTOO
and MAHADEO RAMPRASAD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

CHARLES WAGMAN, representing the Applicants

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF 16 October 1992

HEARING: 22 December 1992

Toronto

REASONS FOR DECISION AND ORDER

These were two appeals before the Commercial Registration Appeal Tribunal which were heard together because of the same issues in both of them. Many of the exhibits were common to both matters and had the same numbers in both and are filed together.

The claims of all of the Applicants are against the Ontario New Home Warranty Program under section 14(1)(a) of the Ontario New Home Warranties Plan Act for the return of certain deposit monies paid by them to a vendor/builder Tormina Homes Ltd. pursuant to Agreements of Purchase and Sale for the purchase of two homes. Eventually these transactions were never completed and the Applicants seek the return of these deposits.

The relevant facts are as follows. On June 4, 1989, Mahadeo Ramprasad made an offer to purchase Lot 14 on the east side of O'Malley Crescent and Martin Ramsaroop and Sylvia Jagtoo made an Offer to Purchase Lot 12 on the east side of O'Malley Crescent in a subdivision being built by the vendor/builder. On June 5, both Offers were accepted. Both Offers called for a purchase price of \$394,900 payable \$10,000 by way of deposit with the offer, \$5,000 further deposit by July 6, a further deposit of \$5,000 on August 6, a further deposit of \$5,000 on September 6, a further deposit of \$5,000 on October 6, and the balance on closing which was fixed for December 29, 1989.

In fact, the first deposit of \$10,000 was paid in each case as also was the second one of \$5,000 (these were late but were accepted and nothing turns on the fact that they were late), but no further monies were paid and the transactions never closed. All parties to the two transactions were represented by solicitors throughout and by counsel at this hearing.

A considerable amount of evidence at the hearing was directed to the issue of whether or not the vendor built the houses for which the purchasers bargained to get or not. Schedule "B" to Exhibit 5 in both proceedings is made by reference a part of the Offers of Purchase and Sale and indicates that the house to be built in each case was the model, "The Buckingham" with Elevation No. 1 as shown thereon. In fact, in Mr. Ramsaroop's case, the house built was that shown as Elevation No. 2.

There was some conflict in the evidence as to how this came about. It was the evidence of Mr. Beresford (the architect employed by the Town of Whitby to analyze and appraise plans for building to see that they complied with architectural guidelines), and of Mr. Langer, an architect employed by the vendor to prepare and supervise its building plan and by a principal of the vendor corporation that the house on Lot 12 had to be changed to Elevation No. 2 in order to comply with these guidelines and that they had a meeting with and obtained the agreement of Mr. Ramsaroop to make this change. The Applicant Ramsaroop denied having agreed to this change and said that the first time he knew anything about it was when the construction of the house reached the stage that it became apparent he was not getting Elevation No. 1 as stipulated in the written contract. Mr. Ramsaroop said that he complained at once verbally to the builder when he saw this.

The evidence on behalf of the Program was to the effect that no such complaint was received by the builder until after the solicitors of the builder had written to him on June 27, 1990 demanding payment of the final \$15,000 then due for the last three deposit instalments. At that time, the solicitor for Mr. Ramsaroop replied in writing making this complaint as to the change of the elevation and also referring to some other changes in the building plans on the strength of all of which, on behalf of his client, he declared the transaction to be at an end and demanded a return of the \$15,000 deposit which had already been paid. A similar exchange of correspondence took place between the solicitors with regard to Mr. Ramprasad's purchase, except the change of elevation did not apply in his case.

While the evidence is not clear in detail as to how exactly this came about, it is a fact that all parties either explicitly or implicitly agreed to an extension of the closing past December 29, 1989 and to the payment of the remaining deposit

instalments at dates later than stipulated in the written contract. All of this was done verbally but the Tribunal finds on the evidence that all parties did agree to these changes because the solicitor for the vendor was writing as aforementioned long after the fixed closing date demanding the arrears by July 6, 1990, the Applicant was still seeking from the vendor extensions to pay these arrears well after the fixed closing date and on March 10, 1990, Mr. Ramprasad signed a colour and material chart indicating his choices of the same and indicating a closing date then contemplated of August 31, 1990.

Both agreements provided in paragraph 7 thereof that time should be of the essence therein, but the Tribunal finds that the conduct of the parties with regard to the fixing of the dates for the payment of the deposit instalments, for the commencement of construction (paragraph 1 provided that construction should not begin until all deposits were paid and, in fact, the vendor built both houses with only one-half of the deposit money paid in each case) and the fixing of the dates for closing was such that all parties waived their rights to rely upon the clause that time should be of the essence with regard to these items. None of the agreements to postpone the dates were reduced to writing and the evidence did not establish verbal terms or conditions upon which these changes were made, so the Tribunal must find that this clause making time of the essence cannot be enforced with regard to any of the aforementioned provisions of the contract.

The situation is, however, different when we come to another provision in both contracts, in paragraph 18 thereof, which reads as follows:

In the event that the dwelling to be completed by the Vendor on the Real Property, cannot for any reason be completed by the closing date, the Vendor shall at its sole option have the right to declare this agreement null and void or to extend the date of closing for any length of time from time to time up to 120 DAYS (which later date is hereinafter referred to as the "Extended closing date"). In the event that the dwelling is not completed by the extended closing date, this agreement shall be deemed null and void and all deposit monies shall be repaid to the Purchaser without interest or deduction.

This clause, inserted in the agreements by the vendor/builder, gave it an unfettered unilateral right to extend the closing date for 120 days if the circumstances arose (which they, in fact, did) that the dwelling was not completed on the fixed closing date and further provided that, if it was not completed by the extended date the transactions were at an end and all deposit monies paid should be repaid without interest or deduction. Applying the contra proferentum rule to the interpretation of this clause, it should be read to provide the vendor/builder with no further rights or benefits than those actually stipulated. In the result, the dwellings were not completed by December 29, 1989, and were not completed within 120 days thereafter and we have no evidence upon which to find a contracting out of the provision of this paragraph 18 by the parties or their replacement by some other provision so the Tribunal must give effect to these contractual obligations placed upon all parties and must find the Applicants are entitled to the return of the \$15,000 deposit monies paid in each case without interest and without deduction.

The Tribunal also finds that the failure on the part of the vendor/builder to repay the deposits as required by this clause in the contract constitutes a failure on its part to perform the contract and, therefore, comes within the provisions of section 14(1)(a) of the Act.

Accordingly pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay to each of the Applicants these two sums of \$15,000, without interest and without deduction.

ANITA RAMSAY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GERRY BEECH, Member
HANS G. KEPPLER, Member

APPEARANCES:

P.B. CHAPMAN, representing the Applicant

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 3 February 1993

Toronto

REASONS FOR DECISION AND ORDER

This is claim by Anita Ramsay under the provisions of Section 14(1)(a) of the Ontario New Home Warranties Plan Act ("the Act") for damages against a vendor for financial loss resulting from the bankruptcy of the vendor.

The facts are as follows. At the time of the initial agreement to purchase, Anita Ramsay was a registered real estate agent representing the vendor in the sale of lots in a subdivision in Dorchester, Ontario.

On November 11, 1988, the Applicant entered into an Agreement to purchase a particular lot in a subdivision and filed a statement of disclosure as is required under the Real Estate and Business Brokers Act. The purchase agreement was for a price of \$137,000 with a \$10,000 deposit and provided that a house would be constructed based on a plan determined at a later date.

Anita Ramsay testified that on December 13, 1988 because a potential purchaser indicated that such purchaser wanted this specific lot, it was agreed between Anita Ramsay and the builder that another lot would be substituted for the original lot. On March 29, 1989, the model to be built on the substituted lot was determined and the price was increased to \$173,000.

On April 14, 1989, Mrs. Ramsay submitted an offer for this substituted lot from a purchaser who was a client of Mrs. Ramsay's office to the builder for a purchase price of \$167,000 with a deposit of \$16,700 which agreement was accepted by the builder April 15, 1989, all signatures witnessed by Anita Ramsay. It is to be noted that the builder at April 15, 1989, had no authority to enter into an agreement with the purchaser as the builder was already obligated to sell the lot and house to be constructed thereon to Anita Ramsay.

An assignment agreement, however, was executed by Anita Ramsay and the builder on April 17, 1989. This agreement provided that in consideration of the assignment of the agreement of November 11, 1988 to the builder, the builder would pay certain monies "upon the completion of any other transaction for the sale of this lot."

The first paragraph of this agreement provided no commission would be paid to the real estate company in respect to the offer to purchase dated November 11, 1988 with Anita Ramsay as purchaser. The second paragraph provided that a commission of \$1,670 pursuant to the Offer to purchase dated April 14, 1989 would be paid to the realty company. The third paragraph provided that the sum of \$33,230 by certified cheque would be paid to Anita Ramsay. The agreement contained an undertaking to inform the builder's solicitor of this obligation and irrevocably directed the solicitor to pay the sum on closing of this transaction. This agreement was signed by the builder and at the bottom of the page Anita Ramsay, as purchaser, under date of April 17, 1989, stipulated the following:

I/We hereby agree to assign my offer to purchase dated Nov. 11, 88 to Triple Crown Homes, for the consideration stated above.

The builder went bankrupt on December 12, 1989 and no payments were made to Anita Ramsay. Evidence before the Tribunal indicated that the purchaser of the substituted lot ultimately received, pursuant to Power of Sale proceedings, a direct transfer of the property in an unfinished state for a price of \$125,000.

It was submitted on behalf of the Applicant that she was a person who entered into a contract with a vendor for the provision of a home under Section 14(1)(a) and that she had a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor. This was based upon the agreement of November 11, 1988. It is the view of the Tribunal that had the transaction stopped at that point, the Applicant would clearly have been covered under Section 14(1)(a) of the Act. A \$10,000 deposit defined under Section 1(1) of the Regulations as

monies received before the date of possession from her as a "purchaser on account of the purchase price payable under a purchase agreement" had been made. In the view of this Tribunal, this would have continued to apply to the substituted lot.

What effect, however, does the agreement of April 17, 1989 have on this deposit? It was submitted on behalf of the Applicant by her counsel that the assignment was conditional upon the payments being made and that since the payments were not made Mrs. Ramsay is still in the position of being a person who entered into a contract with a vendor for the provision of a home and has an action in damages for financial loss.

Counsel for all parties acknowledged that the assignment agreement is extremely poorly worded. There is no provision for what might happen in the event that no closing occurred. There is also the question of what effect there would be on the direct Agreement of Purchase and Sale between the builder and the ultimate purchaser of this substituted lot. In the view of this Tribunal the assignment agreement was contemplated and relied upon in that Anita Ramsay was a participant in the final purchase agreement concluded two days prior to the execution date of the assignment agreement.

It is the view of this Tribunal that the effect of this assignment agreement was to feed the estoppel which might otherwise be raised in order to permit the builder to sell directly the substituted lot for the sum of \$167,000 and to obtain deposits from those ultimate purchasers amounting to \$19,700.

The effect of the assignment agreement was to transfer all rights which Anita Ramsay had against the builder pursuant to the November 11, 1988 purchase agreement back to the builder. In the view of this Tribunal, the effect of that agreement was to cancel the November 11, 1988 agreement. The consideration for the assignment was the provision of a commission of \$1,670 to the Applicant's realty company and the promise of payment to her of the sum of \$33,230. Ultimately the property was transferred and, therefore, payment of these two amounts could presumably be claimed against the builder. By this time, however, the builder had gone bankrupt and had no assets to satisfy a claim. Anita Ramsay's claim therefore against the builder was not the \$10,000, but \$33,230 and on behalf of her employer the real estate commission. In fact, however, her Proof of Claim filed with the Program was only for the \$10,000 deposit under the November 11, 1988 purchase agreement.

It is the decision of this Tribunal that the effect of the agreement of April 17, 1989 between Anita Ramsay and the builder was to cancel out the contract with a vendor for the provision of a home. This agreement does not in any way constitute

a contract for the provision of a home as stipulated in Section 14(1)(a). Had Mrs. Ramsay simply assigned her agreement to the ultimate purchasers that agreement of November 11, 1988 would have continued in effect, but the procedure which the Applicant followed eliminated the purchase agreement and substituted her remedies under that purchase agreement to whatever remedies might be available under the Agreement of April 17, 1989. The Tribunal is not unmindful of the fact that the evidence clearly indicated that there was a close relationship between the Applicant and the builder as evidenced by the Applicant's evidence that she had purchased a lot in another subdivision from this builder and the ease with which lots and house models were substituted in the agreements to which Mrs. Ramsay was a party. We are also not unmindful of the fact that by her testimony, the assignment agreement of April 17, 1989 was prepared in Mrs. Ramsay's office on the advice of persons in that office, was executed by Mrs. Ramsay and the builder, and the agreement with the ultimate purchaser of April 14 and April 15, 1989 was also participated in by Mrs. Ramsay not only as an agent for both the builder and the purchaser, but in an active negotiating capacity and as a witness to the transaction. As a real estate sales agent, the Applicant had to be aware of what she was doing in April 1989 and the necessity of removing herself from the position of being a purchaser in order to effect a valid Agreement of Purchase and Sale between her clients and the builder.

Therefore, pursuant to the authority vested in the Tribunal under the Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicant.

MR. AND MRS. DAVID ROBICHAUD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

MR. AND MRS. DAVID ROBICHAUD, appearing on
their own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DOMENIC ROTUNDO, representing Bay Park Homes

DATE OF

HEARING: 5 October 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants from a decision set out in a decision letter from the Ontario New Home Warranty Program dated May 31, 1993 denying their claim for \$6,125 by way of compensation for delayed closing. The relevant facts are not in dispute.

The matter begins with an Agreement of Purchase and Sale of which we have only an excerpt by way of an exhibit which does not show the date of the making of this Agreement (tab 1 of Exhibit 8). However, the closing date is shown and was fixed for August 22, 1991. On August 12, 1991, the closing date was extended to December 20 of that year. On December 4, 1991, it was extended further to March 24, 1992. On December 9, 1991, the solicitors for the purchasers wrote to the solicitors for the vendor requesting that the closing date be extended to April 24, 1991. On March 27, the vendor's solicitors wrote to the purchaser's solicitors advising of a problem with a strike and advising of a new closing date for April 24, 1992 which was the date which had earlier been requested on behalf of the purchasers and their solicitor wrote to the Applicants advising that the date which they had requested had been confirmed. In his evidence, Mr. Robichaud told the Tribunal that he and his wife were told on April 21 that the vendor might not be able to close on April 24 because of a problem of some

construction liens on the property. This presented a real problem to the Applicants because they had plans to leave Canada very shortly on a wedding trip to Greece. The lease on the premises where they were then living was to expire on April 30 and they had to move their possessions and be ready to leave the country for three weeks. Accordingly on April 24, Mrs. Robichaud went through the house with a representative of the builder and on that date a Certificate of Completion and Possession was completed and signed on behalf of both parties. A copy is found at tab 12 of Exhibit 8. It is stated to have a list attached thereto which is not included with the Exhibit which is not of consequence to the issue in this hearing.

On the same date April 24, Mrs. Robichaud obtained the key to the house and the Applicants took possession and moved all of their furniture and possessions into it on April 26 and 27. They understood that the solicitors had instructions to close the transaction as soon as the liens had been cleared from the title and they placed their solicitors in funds to close and left for Greece on their wedding trip on May 3. In fact, the solicitors for the vendor/builder had the liens removed and were in a position to close the transaction and did close with the Applicants' solicitors on May 6 when the money was paid over and the deed or transfer delivered and registered. Accordingly when the Applicants returned from Greece after their three week trip, the transaction was closed and they were the owners of the house of which they had previously taken possession on April 24.

The Program sets up three defences to the claim.

1. The claim was made upon the Program on a date beyond the one year allowed and is out of time and fails on this ground.

2. The extension of the closing was always pursuant to the Agreement of both parties and the claim therefore fails on this ground.

3. The Applicants have not proved damages or loss suffered by them and, therefore, cannot succeed with a claim for compensation on this ground.

The Tribunal will now deal with each of these defences.

Claim made late

Section 20 of Regulation 892 made pursuant to the Act provides:

20. A claim may be made under subsection (17)(1), subsection (18)(1) or section 19 only where,

-
- (b) the claim is made by an owner within one year after the date upon which the home is completed for possession.

It is important to note that the one year starts to run on the date the home was completed for possession (April 24, 1991) and not from the date the transaction was closed (May 6, 1991). The claim itself is provided by section 17(1):

17.(1) Every vendor of a new home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

(a) the date originally fixed for closing the purchase agreement; or

(b) an extension referred to in clause 3(a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

The Tribunal finds that the times limited for the making of this claim began to run on April 24, 1991 and was, therefore, made beyond a year thereafter and the Program has succeeded in establishing this defence.

Extensions of the closing dates were by agreement

The provisions for the liability of the Program in these circumstances are found in Section 5(iii) of Regulation 894 made pursuant to the statute and, in fact, are similar to the contractual provisions between the parties set out above. Part of this rather lengthy clause reads:

...However, if the Purchaser does not terminate as above, closing shall be deemed to be extended to a date 5 days following completion of the dwelling as required by the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period.

In this case, the parties did "otherwise agree" to the extension to April 24 as evidenced by Exhibit 12. Therefore, the

Applicants cannot maintain their claim in the face of this provision.

Failure to prove damages

The evidence is clear that the Applicants did pay the sum of \$6,125 in rent to the landlord of their previous premises which they would not have paid if the transaction had closed as originally contemplated. The Applicants also established that they had been paying \$830 a month rent prior to the first month of extension when they went on a month to month basis because they did not know just how long they would be there and the landlord raised the rent on this basis to \$875; \$45 more per month. However, it is also clear that if the transaction had been closed on the original date the Applicants would, as of that date, have been responsible for interest payments on their mortgage of \$108,000, the municipal taxes and any other rates chargeable against the property, whatever utilities and insurance they had to pay and they would also not have had whatever the value to them was of the difference between the \$108,000 and the balance due on closing shown by the Statement of Adjustments to be \$119,096.38. The amount of \$875 per month may well have been not much if any more than the total of these items and may even have been less. The Tribunal does not have the figures upon which to calculate these items, and the onus of proving these damages was upon the Applicants. Therefore even if the Applicants had been able to establish entitlement to compensation for delayed closing by meeting the test of the first two defences, the claim would have failed on this ground.

Therefore, by reason of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

THOMAS FRANCIS RYDER (RYDER INVESTMENTS)

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, Presiding
JACINTH HERBERT, Member
HANS G. KEPPLER, Member

APPEARANCES:

BRIAN CAMPBELL, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 19 July, 1993

Toronto

REASONS FOR DECISION AND ORDER

No one appearing for the Applicant by 10:00 o'clock in the forenoon, upon the application of counsel and upon the presentation of evidence on behalf of the Respondent, the Tribunal directs the Ontario New Home Warranty Program to carry out its Proposal to revoke the registration of the Applicant.

The above decision and reasons therefor were orally given by the Vice-Chair at the conclusion of the hearing in the presence of the other members who concurred.

A. SCARPAZZA MASON CONTRACTOR LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
DR. ASSELIN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:
PHILIP SCARPAZZA, agent for the Applicant
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 25 September 1992 Toronto

REASONS FOR DECISION AND ORDER

By Notice of Proposal dated the 6th day of August 1991, the Registrar of the Ontario New Home Warranty Program refused to renew the registration of the appellant company. The reasons cited are several, but all allege breaches of warranties under section 8(2) of the Act and subsections 3 and 4 of section 1 of Regulation 728 of the Regulations.

The facts are that the purchasers had taken possession of a new home built by Scarpazza and the ceramic tiles eventually began to crack. This continued from May 8, 1989, the date of the first complaint to January 20, 1991, when the owner obtained a quotation to install a new floor.

It is contended by the Program and conceded by the builder in correspondence through its solicitor that the subfloor does not meet the standard required by the Ontario Building Code. The underlay used was 6 millimetres as opposed to the designated 15.9 millimetres in section 9.31.6.3 of the Ontario Building Code. There is, therefore, an infraction of the Code and consequently a breach of warranty pursuant to section 13(1), (2), and (3) of the Ontario New Home Warranties Plan Act.

The only issue between the parties appears to be the contention by the appellant that the onus is on the Program to prove the cause of the problem, whereas the Program maintains it need only prove an infraction of the Building Code which the

builder had failed to address; that infraction being the contractor's failure to install underlay that conforms to the Ontario Building Code Regulation.

We are of the view that since there was both an infraction of the Building Code and the Ontario New Home Warranty Plan Act, it was incumbent upon the builder to address it to the satisfaction of the owner and the Program. In this case, it meant taking up the tiles, replacing the underlay and installing new tile. The builder was not prepared to do this and as a result, after the owner obtained a quotation from Grant's Tile and Bath Centre, the Program made a cash settlement with him in the sum of \$9,333.14.

On June 11, 1991 the Program invoiced the builder for this amount together with the sum of \$1,399.97 administration fee, and \$751.32 GST making a total of \$11,484.43. This sum has not been repaid by the builder to the Program and forms the subject of this appeal since the Program refuses to renew the appellant's registration until it is reimbursed.

We do not find it necessary or useful to deal with all the evidence brought before us since we have found the builder to be in breach of certain of his warranties both to the owner and the Program. Complaints from the homeowner to the Program began on May 8, 1989 and continued through a succession of letters, January 15, 1990, June 26, September 5 and January 20, 1991, with a conciliation on October 20, 1989 and a reinspection on November 30, 1990. Clearly sufficient time had elapsed for the builder to address the problem to the satisfaction of all parties, but he either refused or failed to do so and we must find he is in breach of subsection 3 of section 1 of Regulation 728. By his failure to reimburse the Program, we also find he is in breach of section 8(2) of the Act.

The Registrar has refused to renew the company's registration and we hereby direct the Registrar of the Ontario New Home Warranty Program to carry out his Proposal unless within 15 days of the release of this decision, the Program is reimbursed by the builder in the sum of \$11,484.43.

DR. AND MRS. A. SEETNER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding

APPEARANCES:

MRS. AIDA SEETNER, representing the Applicants

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 1 March 1993

Toronto

REASONS FOR DECISION AND ORDER

This is claim by the Seetners in respect to faulty workmanship and/or materials relating to kitchen cupboards installed in their home of which they took possession April 12, 1990.

Mrs. Seetner testified that within six weeks of possession, they noticed chipping of the paint in the kitchen cabinetry which they considered inexcusable in a home purchased by them for a price of \$728,000. The submission by Mrs. Seetner was that this chipping was due to inferior workmanship or material and estimated that the cost of rectifying the situation for 30 cabinet doors and six drawers would amount to approximately \$7,000. Her evidence was that all of the doors and drawers had problems and that the cabinet company repaired approximately 20 of the doors and drawers being the cabinetry most affected. Mrs. Seetner stated that both the builder and the cabinet manufacturer attended in July of 1990 at her home, inspected the work and did a touch-up job which was completed in December 1990. An inspection report made in January 1991 did not deal with this matter because Mrs. Seetner testified the touch-up appeared satisfactory. Subsequently, however, she claimed that the chipping re-occurred and filed a subsequent complaint in February 1992.

Mrs. Seetner brought to the Tribunal three cupboard doors and one drawer. She identified two of the doors as being under the sink and the third door immediately adjacent to the right. The drawer was a cutlery drawer. In all cases, there was minor

chipping on the raised portion of the door panels on the front side, but no evidence of any repair could be detected and Mrs. Seetner testified that this was because the touch-up repairs had chipped off the cabinetry and in fact the chipping had expanded. Mrs. Seetner testified that the doors and drawer which she had brought were only examples and that other doors and drawers were also badly chipped. No photographs, however, were introduced in confirmation of this testimony.

Evidence on behalf of the Program was given by an inspector for the Program and a representative from the builder, the customer service manager. Both of these witnesses testified that in their view the chipping was of a minor nature and had to be related to normal use. The representative from the Program testified that in his inspection, he observed no peeling of the paint but only minor chipping and in his view only in respect to the doors which Mrs. Seetner had brought into the Tribunal hearing.

The representative from the builder stated that the touching-up done was on the basis of public relations only and not an acknowledgement of any defect in either the workmanship or the material. Again, he indicated that the only areas of concern were those in the heavy use area identified by the doors and drawer brought to the hearing. It was also pointed out after examination of the doors that the rear surface was painted exactly in the same manner as the front surface and there was no evidence of chipping on the reverse side of the doors.

Both representatives for the Program and the builder stated that in their view the touching up of the doors and drawers would not exceed \$200 in costs. Mrs. Seetner acknowledged that that might be so, but argued that it would only be a temporary resolution of the problem and that the cabinetry would have to be replaced which was the reason for her cost estimate. She failed to call any technical evidence to support her position however. She stated that she had consulted experts in the field, but that they would not voluntarily attend to provide evidence. She conceded that she had been informed that she was entitled to subpoena witnesses, but felt that they would not even under a subpoena testify against the builder. As a result, I was left with the testimony of Mrs. Seetner, the representative from the builder and the representative from the Ontario New Home Warranty Program and the physical evidence represented by the doors and drawer brought to the hearing by Mrs. Seetner and the photographs filed.

Counsel for the Program submitted that the onus was on the Applicant to show that there was a breach of warranty and that damages resulted therefrom. Counsel also submitted that on the basis of the evidence, in particular the physical evidence of the condition of the doors and the drawer brought to the hearing, the

chipping could only be considered to be either part of normal wear and tear or to have resulted from improper maintenance both of which are excluded under the provisions of Section 13(2) of the Act. In view of the failure of the homeowner to satisfy me otherwise and having observed the nature of the complained defect, I cannot find that the homeowner has proven that the cabinetry doors and drawers are defective in either material or workmanship. I was particularly impressed with the fact that there was a total lack of chipping on the reverse side of the doors brought to the hearing.

Pursuant to the authority vested in me therefore under section 16(3) of the Ontario New Home Warranties Plan Act, I hereby confirm the decision of the Ontario New Home Warranty Program and direct the Program not to accept the claim of the Applicant.

791209 ONTARIO LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
GERRY BEECH, Member
LOUIS A. RICE, Member

APPEARANCES;
IVAN G. TOMLINSON, representing the Applicant

STEPHEN A. AUSTIN, representing the Registrar under the
Ontario New Home Warranties Plan Act

DATE OF
HEARING: 24 September 1992 Toronto

REASONS FOR DECISION AND ORDER

Michael Fiume, a director of 791209 Ontario Limited, appeals to this Tribunal from a decision of the Registrar of the Ontario New Home Warranty Plan Act to revoke the registration of that company on the grounds that pursuant to section 8(2) of the Act, Fiume's past conduct affords reasonable grounds for belief he will not carry on business in accordance with law and with integrity and honesty.

The evidence, which is undisputed, discloses that Fiume was a director of a building company registered as 655533 Ontario Inc. under the Ontario New Home Warranty Plan until its registration was revoked for its failure to reimburse the Program for monies paid out on behalf of one Hanchar for whom Fiume's company had built a home. The Plan paid out the sum of \$15,448.61 to repair the Hanchar residence and when Fiume and his company refused to compensate the Program, the Registrar issued a Notice of Proposal dated the 6th day of November 1989. Under this Notice, the registrant was given 15 days to appeal to the Commercial Registration Appeal Tribunal, but since no appeal was filed the registration of 655533 Ontario Inc. was revoked on January 8, 1990.

In the meantime, Fiume in association with Santino Bruni and Pashalis Tilelis set up another company at a different location on April 13, 1989, applied for registration under the Ontario New Home Warranties Plan Act which was granted on April 21, 1989. At that time, of course, although the registration of 655533 Ontario

had not been revoked, it was in difficulties with the Hanchar residence. Along with the application for registration, there was the usual Vendor/Builder's Agreement executed between the parties and signed by Michael Fiume.

Mr. Fiume's involvement with both companies was unnoticed by the Program until November 11, 1991 when an application for renewal of the registration of 791209 Ontario Limited was received and a review of the file made by the department. The Program wrote to the appellant as follows:

A review of your file has been conducted and we note your previous involvement with 655533 Ontario Inc., Reference Number 4095, formerly registered with the Program wherein you were a principal/director/ officer.

The purpose of this letter is to advise that your renewal of registration will not be approved at this time in view of the outstanding claims related to 655533 Ontario Inc., Reference Number 4095. We refer to the Hanchar residence located at 527 Highland Crescent, P.O. Box 416, in Beaverton. The total cost incurred by the Program to date is \$18,140.66 to correct warranty items. We require the full payment before any further consideration will be given to this renewal.

Should you fail to satisfy this requirement, we regret that there will be no other alternative but to refuse to renew your registration the result of which will be that 791209 Ontario Limited will not be able to continue building and/or selling new homes in Ontario. We therefore urge you to respond promptly and in this regard expect to hear from you within 15 days of receipt of this letter.

Yours truly
Ingrid McLarnon
Enforcement Assistant

Mr. Fiume now appeals to this Tribunal on the grounds that the Program's claim against his former company was excessive and an unnecessary expenditure on the part of the Plan. We are accordingly invited to consider the background to that claim and decide that issue.

It is clear that when the registration of 655533 was being revoked, Fiume had the opportunity to appeal that decision. No appeal was filed and the revocation was final. Mr. Fiume now seeks to enter by the back door a claim he should have advanced through the front door some two years ago. We are not disposed to entertain any arguments as they are specious and deserving of no further comment.

We find as a fact that Michael Fiume is an officer and director of 791209 Ontario Limited and a former officer and director of 655533 Ontario Inc. We also find on the evidence that the corporation 655533 Ontario Inc. is indebted to the Ontario New Home Warranty Program in the sum of \$18,140.66 and Mr. Fiume under his Vendor and Purchaser Agreement is in default in respect to repayment. This is a fact of which Mr. Fiume is well aware and the repayment of which he and his company have consistently attempted to evade. He has demonstrated neither the honesty nor integrity expected of a builder under the Act nor the good faith required of any registrant who enters into a contract with the Plan.

The Registrar is, therefore, directed to carry out his Proposal.

CARLTON SOMMERS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

CARLTON SOMMERS, appearing on his own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 24 February 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a letter to the Applicant from the Program which is without date, but a copy of which is found at tab 8 of Exhibit 4 herein. It is acknowledged that it was received and the Applicant's appeal properly filed within the time limited so that nothing turns on the absence of the date on this letter. There is only one issue between the parties to be determined by the Tribunal and that is whether a fee paid by a prospective purchaser who enters into a reservation agreement with a prospective vendor which is contemplating building and marketing a condominium building or set of buildings and which receives a fee and then decides not to proceed and does not return the fee can be recovered from the Program by the prospective purchaser under Section 14(1)(a) of the Ontario New Home Warranties Plan Act.

This is an issue with which the Tribunal has dealt in more than one case in the past and there is some conflict in its decisions so, when we come to apply them to this case, it will be of particular concern to have and understand the relevant facts of this case. The Applicant learned of the prospective condominium apartment building being considered to be built in Cambridge, Ontario by a builder, Chimney Hills Estates Limited. He attended at an office of the prospective vendor in Cambridge and he visited the site of the prospective building and obtained a copy of a reservation agreement being used by the prospective vendor. He brought this copy to Toronto to show to his solicitors and obtained their advice. His evidence was that they "made some changes" and

advised him it was in order and he signed it and took it back to the prospective vendor on August 20, 1989. The vendor's representative looked at it and at that time showed him a set of floor plans for the prospective building and told him that as soon as the builder had a building permit it would sent him a draft Offer of Purchase and Sale for his purchase.

The only change which the solicitors appear to have made in the Agreement was to strike out the word "not" from paragraph 10 so that the prospective purchaser could assign his interests in it if he wished to do so. It is clear from all of the evidence, however, that the document was considered by the prospective purchaser's solicitor and that the prospective purchaser entered into it with legal advice. The agreement was executed by the prospective vendor on August 23, 1989 and became a contract in writing between the parties at that time. The evidence did not disclose how the Applicant obtained a signed copy, but there is no doubt that he did so and that the contract came into force in accordance with its terms.

Paragraph 1 of this agreement provided that the Applicant pay the prospective vendor \$2,500 at the time of the making of the agreement and \$2,500 within sixty days thereof. The Applicant paid these sums for a total of \$5,000. Paragraphs 2 and 3 provided that if the prospective vendor, in his sole discretion, decided to make the unit available for sale it would send a notice and a form of Agreement of Purchase and Sale to the Applicant and he would have ten days to make an offer to buy the unit for \$114,900 with a deposit at that time of \$10,000 to be credited to the balance due on closing.

Paragraph 8 provided that such an Agreement of Purchase and Sale should contain a provision that the reservation fee paid upon the agreement should be "held by the prospective vendor and applied on the monthly rent payable under the Interim Occupancy Agreement which commences when the unit is ready for occupancy." I refer to this clause particularly because it specifically does not deal with the reservation fee at that stage in the same manner as the \$10,000 deposit and, at least in the terminology used in the agreement, it is never called or termed a "deposit".

Paragraphs 7 and 9 of the reservation agreement read as follows:

7. Nothing herein contained shall in any way obligate the Applicant Vendor to proceed with the development and construction of the proposed project. In the event the Prospective Vendor has not decided upon a date upon which it intends to make

available for sale the said Unit, and has not mailed the notice to the Prospective Purchaser as hereinbefore provided by Mar. 30/1990, this Agreement shall be at an end and the Prospective Purchaser's Reservation Fee paid herewith as consideration for the execution of this Reservation Agreement, shall be returned to the Prospective Purchaser without interest and each Party hereto releases the other form from all claims and demands whatsoever.

9. This Agreement is personal as between the Prospective Vendor and the Prospective Purchaser and shall not be construed as an Agreement with respect to an interest in land. The Prospective Purchaser will not register or deposit this Agreement nor Notice of this Agreement on the title to the lands.

In giving his evidence to the Tribunal, Mr. Sommers said that the building was not even started in a year's time and no offer was forwarded to him so he asked for the return of his \$5,000. The prospective vendor sent him a letter (also without date), a copy of which is found at tab 6 of Exhibit 4 in which it enclosed a Release form and an undertaking to refund the money by the month of September 1990. The Applicant then made a number of efforts to recover his money, the only one which is of concern here is his making this claim upon the Program for its payment out of the guarantee fund.

The only witness called by the Program was Mr. Scott Burbidge, who is not an employee of the Program but who qualified as an expert witness with regard to the use of this form of reservation agreement. He was for a number of years a vice-president of a development company which built condominium buildings and he was in charge of its operations with regard to a number of buildings where this form of reservation agreement was used. He is now President of a consulting firm where he advises clients concerning these matters and on occasions concerning this form of reservation agreement. He gave to us an impressive list of clients to whom he has provided such advice. He is also presently Chairman of the Metro Toronto Condominium Committee and he is a Director of the Ontario Home Builder's Association. He explained the reasons why this form of agreement is used and the advantages which it provides to both parties. The principal advantage to the prospective vendor is that it provides a method of testing a market before very extensive start-up costs are incurred to get a

condominium project underway. The prospective purchaser also gets the advantage of being able to get in at the beginning of a project at a fixed price if it goes forward but he does not have to do so and can look around and change his mind. Unlike an offer of Purchase and Sale neither party is bound to proceed and, unlike an Option Agreement, either party can "back out" without obligations and without any burden or benefit to either of them.

The foregoing are the facts upon which the Tribunal must now apply the provision of Section 14(1)(a) of the Act which reads:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....
the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The earliest case to which I was referred was that of Victor T. Wilcox (1980) 9 CRAT 104. Neither the terms of the Agreement or other relevant facts are set out in the judgment. The agreement in question appears to have been some form of Option Agreement the Tribunal held against the Applicant's claim saying:

In this case the Tribunal has been unable to discover that a contract for the provision of a home ever existed between the putative vendor, St. David's Investments Limited, and the applicant herein, as purchaser. What we have seen is an option agreement, a contract between St. David's and Mr. Wilcox, which, had it been exercised in accordance with its terms, and at the option of the applicant, would have given him the right to have an Agreement of Purchase and Sale with St. David's. Such an Agreement of Purchase and Sale had it come into existence, would have created a right, beneficial to the applicant, to make a claim, and quite possibly a valid claim, against the guarantee fund established under the Ontario New Home Warranties Plan Act.

But that option, in point in fact, was never exercised and an Agreement of Purchase and Sale as contemplated by the Statute has never come into existence.

Next was cited to me two recent decisions of this Tribunal dealing with claims for the return of reservation fees such as we have here and resulting in the opposite conclusion being reached in each of them. In the case of Julio Carvalho and Fatima Tavares released on October 26, 1992, the prospective purchaser recovered his reservation fee from the Program's guarantee fund and in the case of Eileen McGivern, released on January 25, 1993, she did not. An analysis must be made comparing the fact situations and the reasoning employed in those cases in order to determine which should be the result here.

The critical reasoning in the Carvalho case is the following, commencing on page 9 of the reasons:

If the transaction between Mr. Carvalho and the builder, in its essence, was for the provision of a home, then it comes within the Ontario New Home Warranties Plan Act.

The Tribunal finds that, given the advertisement by the builder inviting the public to purchase a condominium unit from it, all following transactions must be characterized as forming in their entirety an agreement contemplating the provision of a residential unit. The reservation agreement was simply one element in the general scheme between Mr. Carvalho and the builder. At all times, the aim of the builder was to build and sell to the Applicants a condominium. The fact that certain conditions were attached did not negate that intention.

While the New Home Warranty Program attempts to rely solely on one document, the "Reservation Agreement", is only one of the elements in the grand scheme. The starting point is the advertisement offering condominiums for sale - the reservation agreement is the second step in consummating that intention.

Mr. Carvalho stated his intentions very clearly: to become owner of a residential condominium unit. Why else would he have been prepared to pay \$6,000 which constituted 5% of the eventual salesprice? If the reservation agreement was truly meant to do no more than reserve a unit sometime in the future, the fee would have been nominal or even gratuitous. As the reservation agreement reads, it can be assimilated to the provision of a home against a reasonable deposit.

In the Platinum case [a decision of the Ontario Court of Appeal - Platinum Property Ltd. Partnership et al v. Ontario New Home Warranty Program (1991) 1 O.R. (3rd) p. 513], all parties sought to exclude the transaction from the Act, because they all received benefits by so doing. The exact opposite is the case with Mr. Carvalho. Were the scheme devised by the builder to be allowed, the benefits would accrue only to the builder. That is, the builder would be allowed to collect hundreds of thousands of dollars, if not millions of dollars, in "reservation fees" without having to post any security with the Program. This would obviously save him considerable funds while being able to operate on the cash flow provided by the unsuspecting prospective purchasers. On the other hand, the purchasers would not only receive no benefits from the transaction, they would be penalized. Instead of the monies they paid being warranted by the Program, they would have to depend solely on the creditworthiness of the builder and his willingness to meet his obligations. Is it reasonable to presume that Mr. Carvalho would have signed the reservation agreement if he had been aware of its potential ramifications? If he signed a conditional offer to buy, he would be protected by the Program. Signing the reservation agreement, the protection would be lost.

Moreover, he specifically sought reassurance that he was protected under the Act and had every reason to believe he was.

On the facts presented, the Tribunal must presume that the reservation agreement was devised by the builder as a scheme to avoid the Program. Were the Tribunal to allow this scheme to succeed, it would go against the whole economy of the Program whose aim is to protect those seeking to buy a new home or a condominium from a builder.

The Tribunal finds that the transaction between Mr. Carvalho and the builder constituted, as a whole, a contract, for the provision of a home and as such falls within the Ontario Act. The nature of the transaction contemplated the provision of a new home and the amount paid represented a deposit even though it was characterized as a reservation fee. Mr. Carvalho was dealing with a builder as contemplated by the Ontario New Home Warranties Plan Act.

The critical reasoning in the McGivern case is the following commencing at page 6 of the Reasons:

In the case before the Tribunal, the applicant must be able to demonstrate that she clearly falls within the language of section 14(1)(a) and within the definitions that that provision derivatively depends upon. This requires, inter alia, that the contract pursuant to which the claim is made be "a contract with a vendor for the provision of a home". A vendor, in turn is defined as a "person who sells...a home" and "sells" includes entering into an agreement to sell. Accordingly Mrs. McGivern is not entitled to relief from the guarantee fund unless she can satisfy the Tribunal that the reservation agreement was on its terms an agreement to sell a home. This is clearly not the case. The reservation agreement in no way obliges Preston to sell a condominium unit to Mrs. McGivern. Preston is completely at liberty not to

proceed with the development at all or to refrain from offering the condominium unit for sale. There is no obligation on Preston to complete its promise of sale. Indeed, there is no promise of sale. The reservation agreement merely contemplates the possibility of a future agreement of sale, should Preston elect to offer the unit for sale, (in which case it would have to notify Mrs. McGivern) and should Mrs. McGivern elect to accept that offer by entering in an Agreement of Purchase and Sale.

Furthermore, payment out of the guarantee fund pursuant to section 14 of the Act is expressly subject to the limits fixed by the regulations. Section 6 of Regulation 726 (quoted above) clearly contemplates that claims pursuant to Section 14(1)(a) of the Act will be made by a purchaser in respect of a purchase agreement, i.e. an agreement with a vendor providing for the purchase of a home by the purchaser. This further supports the view that no claim is supportable where, as is the case here, the claimant cannot be described as a person who has agreed to purchase a home pursuant to a purchase agreement.

The Tribunal goes on to discuss the Wilcox and Carvalho judgments in the following manner:

The decision of this Tribunal in Victor S. Wilcox (1980) CRAT 104 was that no valid claim exists against the Program where the claim is made on the basis of an option to purchase a home where the option was not exercised and where, therefore, the agreement of purchase and sale ever came into existence.

In Carvalho and Tavares, a recent decision of this Tribunal released on October 26, 1992, the Tribunal found that the Wilcox decision had been superseded by the judgement of the Ontario Court of Appeal in Platinum I. Property Ltd. vs. Ontario New Home Warranty Program (1991) 1

O.R. (3d) 513. In Carvalho, the Tribunal held, in a fact situation that is in all material respects identical to the facts in this case, that a claim against the guarantee fund could be successfully made on the basis of a reservation agreement. We are advised that the Carvalho decision is currently under appeal.

We respectfully disagree with the reasons and result in the Carvalho decision as well with the inferences drawn from the Platinum case and the application of those inferences to reservation agreements.

In Platinum, the Ontario Court of Appeal considered whether the Ontario New Home Warranties Plan Act applied to certain agreements for the purchase of limited partnership interests in a condominium development where the agreements included an option in favour of the investor to obtain a transfer of title to a specific condominium unit once the project had been registered. The question before the Court of Appeal was whether the developer was a "vendor" within the meaning of the Act, and, therefore, required to register with the Program, and inter alia, post deposit protection security with the Program. Consideration of the meaning of the term "vendor" in turn entailed consideration of the definition of "sell" in s.1(1) of the Act and specifically the meaning of "an agreement to sell". The Court of Appeal cited a passage from the decision of the United States Supreme Court in Treat v. White, 181 U.S. 264 (1900), that "an agreement to sell is simply an obligation on the part of the vendor to complete his promise of sale." Although the agreement before the Court of Appeal clearly imposed a positive obligation upon the vendor to transfer title to the unit to the investor, at the investor's opinion, the Court of Appeal found that this factor alone was not determinative of whether or not the agreement to sell the unit within the meaning of the Act.

At page 519 of Platinum, Mr. Justice Carthy, who wrote the reasons for decision states: "It is tempting to reach out to the high authority of Treat v. White and conclude that no matter how you describe the agreement before us it is an agreement to sell. However, in the same opinion Mr. Justice Brewer recognized that even the letter of a statute may not control if there is reason to suggest that the legislature intended otherwise." The Court of Appeal went on to consider the essential nature of the transaction and to characterize its prime thrust as tax driven scheme allowing a purchaser to join with others in the business of renting housing units. The option to take title to a condominium was characterized as "appendage" to this central purpose and not determinative of the transaction's essential nature. The Court reasoned that the Act was intended to provide protection to purchasers of new homes and noted the lack of harmony between this protection and the nature of the transactions before it. In result, the Ontario Court of Appeal concluded that the agreements were not agreements to sell a home within the meaning of the Act. In effect, the Court of Appeal reined in and restricted the letter of the statute by interpreting it in a manner which was consistent with its objective of protecting new home purchasers and owners. However, the decision of the Court of Appeal does not stand for the converse proposition that where a transaction involves a consumer and/or new home the protection afforded by the Act automatically applies. The statutory requirement of "an agreement to sell" is still a necessary prerequisite to any entitlement against the guarantee fund.

We also note that in Carvalho, the Tribunal concluded that the agreement was scheme devised to avoid the Act and would allow the builder "to collect hundreds of thousands of dollars, if not millions of dollars in reservation fees without having

to post any security with the Program. This would obviously save [the builder] considerable funds while being able to operate on the cash flow provided by unsuspecting prospective purchasers." We take notice of the fact that reservation agreements are sometimes used by developers for a legitimate purpose, namely to test the market for the level of serious interest in the proposed project that exists among prospective purchasers. Once the developer is committed to proceeding with a project, it would be foolhardy and impractical to proceed on the basis of reservation agreements alone as these would leave the prospective purchasers free to walk away from the project at any time. Furthermore, it would be difficult if not impossible for a developer to obtain institutional construction financing for the project on the basis of reservation agreements alone.

In the McGivern case, the Tribunal concluded that a prospective purchaser in a reservation agreement does not come within the language of Section 14(1)(a) of the Act and within the definitions upon which that provision derivatively depends.

With respect, I prefer the reasoning in the McGivern case to follow in determining the issue at this hearing. There was no evidence here and no suggestion that the prospective vendor used the reservation agreement for any but a perfectly proper and legal purpose. The wording of the reservation agreement is clear and unambiguous and, applying the ordinary rules of contractual construction, effect should be given to it in accordance with its terms without recourse to any parol or other extrinsic evidence or to any other rules such as the contra proferentum rule. The scheme of the reservation agreement provided certain benefits and advantages to both parties. On the other hand, it did not contain certain other benefits for both parties which would have been found in an Agreement of Purchase and Sale or in a regular option agreement. The evidence is clear that both parties knew and understood what they were doing when they signed this agreement (the Applicant had the advice of his solicitors in that regard), there is nothing about the agreement which renders any part of it unenforceable (e.g. for being contrary to public policy) and the Applicant must be found to be bound by the terms of the agreement which he signed.

Accordingly by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

LEWIS SONSINI and SUSAN HALE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
SELWYN CHARLES, Member
WILLIAM WATSON, Member

APPEARANCES:

LEWIS SONSINI, appearing on their behalf

JAMES I. MINNES and JANE BACHYNSKI, representing the
Ontario New Home Warranty Program

DATE OF 6 August; 2, 3, 4 November 1992;

HEARING: 4, 5 January 1993.

Ottawa

REASONS FOR DECISION AND ORDER

Lewis Sonsini ("Sonsini") and Susan Hale agreed on July 10, 1986 to have K.K. Construction Ltd. ("the builder") construct a two-storey single family residence on Lot 27, Orchard Estates in Nepean which address is now 2 Spring Cress Drive. Possession was taken on January 31, 1987 and the Certificate of Completion and Possession refers to a variety of outstanding items to be completed. A conciliation inspection took place on August 13, 1987 when 17 items were found to be warrantable while another 17 items were not warrantable. A further conciliation inspection occurred on February 26, 1988 when 11 items were found to be warranted and where 6 items from the earlier conciliation list of warranted items were found to be outstanding. Twenty-one other items were not warranted.

After further correspondence, a third conciliation inspection was held on July 27, 1988 at which 6 earlier warranted items, 10 earlier unwarranted items, and 16 new items were considered. A further inspection visit took place on October 26, 1988, to review progress and repairs, and a decision letter for certain items was issued on November 23, 1988. A cash settlement for 6 of the outstanding claims was made for \$997.98 in December 1988.

Further correspondence in 1989 led to a reinspection of the house on March 6, 1989 to resolve complaints about the heating

system. A further Proof of Claim was sought by the Ontario New Home Warranty Program ("the Program"), by letter of November 14, 1989 and this was sent in on November 30, 1989 with 10 complaints valued at \$5,048.00 and a further claim as to frost forming on window frames was set out without any value placed on whatever work would be needed, as well as a concern about a plumbing pipe passing through a cold air return vent. Again, after correspondence certain of these claimed items were accepted by the Program and a cash settlement was made for \$1,353.00..

On April 16, 1991, the Program issued a decision letter with respect to all remaining "first year" complaints about the Sonsini/Hale residence. After that letter, 7 items of complaint were set out on a new Proof of Claim form on April 19, 1991 and the Program issued a decision letter in August denying these claims and from which this appeal is now made to this Tribunal.

The evidence in this appeal was presented to the Tribunal over the six days noted earlier. Sonsini presented his evidence as to 7 outstanding items and brought as a further witness Ted Smith ("Smith"). Smith has had 40 years of construction experience and operates a business of restoration work as well as makes inspection reports on appraisals for owners and buyers. He stated that he is familiar with current construction costs and the provisions of the Ontario Building Code, and has given expert evidence in various courts.

For the Program, the following nine witnesses were called to give evidence:

Stuart Grant ("Grant") is a licensed refrigeration journeyman with 18 years experience in the design, sale, installation and servicing of all types of heat pumps;

Frank Bruni ("Bruni") has had 25 years experience as a carpenter, framer and window installer and did install the windows on the Sonsini/Hale residence;

Robert A. Collins ("Collins") is a 5-year employee of Pella-Hunt Corporation, the supplier of the windows for the Sonsini/Hale residence. He had seven earlier years experience with another such supplier, does service calls, inspects other suppliers' products and knows the design, construction and operation of these windows.

Andre Philion ("Philion") is subcontractor who has had 9 years experience and does repair work for the Program. He also is a renovator and has installed windows;

John Louis McKay ("McKay") is the President of Cityview Flooring Company Limited, which company installed the vinyl cushion floor in the Sonsini/Hale residence;

Philip Mayhew ("Mayhew") is the Operations Manager for the Program in the Ottawa region and does on occasion do conciliation inspections where a second opinion is desired;

Frank Didin ("Didin") is the Manager of Building Permits for the City of Nepean;

Kurt Klinger ("Klinger") was the President of the builder K.K. Construction Ltd. and is now a general contractor for homes and commercial projects with experience since 1976;

Paul Picard ("Picard") is a technical representative with the Program since 1986 and had 12 years of earlier experience as a builder and subcontractor in Edmonton, Alberta. He has become familiar with the Sonsini/Hale residence since 1987, has conducted conciliation inspections and issued reports and has visited the home on some eight occasions.

1. Window framing/insulation/condensation

Sonsini raised concerns about the windows in the residence and these were considered in the conciliation inspection of August 3, 1987 when 3 currently outstanding issues were included on Schedule "A(1)" as warranted items:

- (7) Complaint: GREY BATHROOM: WINDOW WON'T CLOSE, WINDOW FRAME NOT PROPERLY INSTALLED

Observations: The window frame does not appear to be exactly plumb and the window is a little difficult to close completely. It appears the plumbness of the window has affected the closing operation of the window.

The builder shall plumb the window as much as possible and adjust the operating mechanism of the casement window so that it closes with relative ease and also restore any finishes affected with this repair except for painting.

(9) Complaint: GREEN BEDROOM: WINDOW FRAME CROOKED, BIFOLD DOORS NEED ADJUSTMENT

Observations: The window frame is out of alignment more than acceptable. The bifold closet doors are a little difficult to close as they bind at the centre when closed.

The builder shall adjust both the window and bifold doors and restore any affected finishes except for painting.

(11) Complaint: - BRICK STOP ABOVE MOST WINDOWS IS COMING OFF
- BRICK STOP ABOVE WINDOW IN SUNROOM IS MISSING
- MASTER BATHROOM BRICK STOP FALLING OFF

Observations: Above all windows and doors of the first and second floors there is a metal facing filling the gap between the top of the window frame to the underside of the metal sill supporting brick. Two were missing completely and others appeared to be in need of securing.

The builder is to install two facing where required and ensure that all others are secured in a workmanlike manner.

In his letter of November 30, 1990 to Paul Picard, Sonsini stated that the repairs attempted to resolve item (11) above were unsuccessful as there was no wooden member behind the window into which a 4" nail could be driven to keep the facing in place and that this prevailed for the kitchen and sunroom windows also.

At the conciliation inspection of February 26, 1988, item 10 on the Schedule "A(1) thereof states:

(10) Complaint: SOME WINDOWS STILL SCRAPING SILL

Observations: Of the windows viewed, it was found that operation was satisfactory, however, there was some discrepancy as to which windows were

which. The builder's supplier has had prior knowledge as to any problems and the builder should ensure windows operate adequately.

On March 9, 1990, Sonsini obtained a report on his window problems from Bert Bowen Ltd. and sent on a copy to the Program. This report found that the windows in the sunroom were "out of square 3/8" over the 73" height", and that this was caused by being installed tight to the cut frame opening. Bowen found a lack of insulation in some areas and insulation packed too tightly elsewhere. Sonsini did not obtain any estimates for the cost of cutting back the brick around the window opening to enlarge the space and then have plywood shims used to square the windows in the frames. Photographs 1 through 7 were used by Sonsini to show the lack of insulation and the winter frost on the corners of the frames.

On cross-examination, Sonsini agreed that he and Susan Hale had chosen the windows for the house and they wanted aluminum clad windows with the 'slim shade' style. After some repairs, Sonsini said that the windows scraped on the sill when open so this led to the continuing problem complained of at the February 26, 1988 conciliation inspection. While he agreed that brick stops were secure now, he thought that they may come loose if only held up with caulking and not securely nailed.

Sonsini agreed that three windows were in a group of compensation items, but said that the release for these was for the painting of the window frames, and not for the concern of the frames themselves. Sonsini said that the frost problem can be seen on the frames of all 10 main floor windows with the greater problems in the sunroom which has five surfaces exposed to the winter elements.

Ted Smith reviewed his 4-page report of October 29, 1992 which followed a reinspection of the house which he first visited in 1987. He agreed with the Bowen conclusions and found that there was a lack of insulation around windows. He would re-insulate the attic space above the sunroom, use waterproofing on two exterior walls and remove the jambs and sills from 17 windows so as to caulk and insulate and ensure that the moisture barriers are in place. He estimates that these three tasks would cost \$500, \$400 and \$4,250 where the latter was calculated at \$250 for each window opening.

Smith would also insulate the walls of the cold room under the sunroom at a cost of \$480. On cross-examination, he said that all 17 windows had evidence of moisture penetration, but he did not recall seeing any ceiling stains in the sunroom. He did not see any direct evidence of water entry at the window sills and

agreed that the frost problem would be from a combination of high humidity, a lack of ventilation and a lack of insulation. He did not think that a lack of insulation in the cold room would have an affect on the frost concerns of the windows.

Bruni said that he had installed the Pella windows on the house, but was not responsible for placing any insulation. He said that wood does shrink and move as it is a natural product. He said that he would make shims from any wood scrap material on hand such as shingles, aspenite or plywood.

Collins said that the Pella windows installed meet or exceed all of the CSA Standards for windows in a residence. He said that the most common complaint concerns condensation since homes built today are more air-tight and a furnace without a hot moist air exhaust will add to moisture in the home already caused from washing, cooking and baking. He said that these windows have a pre-formed metal sill and no moisture can enter through the frame contrary to Smith's and Bowen's suggestions. He said that the corners are sealed and fully caulked, and that any water on the sill will evaporate so no slope is needed. He cited 38 years of usage of these windows and finds any interior stains to be the result of condensation due to life-style, lack of ventilation and high temperatures. The sunroom windows particularly for him are a concern due to day and night temperature variations.

On cross-examination, Collins said that shims for windows can be aspenite, plywood or shingle and that these windows are standard for 1986 installations. He found any water entry through the wood frame of the window unlikely as the wood is pressure-treated before use.

Philion attended at the Sonsini/Hale residence in June 1991 to put insulation around the living room window on the north side. Inside the house, he said that the sunroom window had the jamb taken off and he saw sufficient insulation in the opening, no moisture was seen and a 3/8" gap around the window frame showed that the installation was done in a workmanlike manner. He saw no water stains or deterioration of the insulation there. He did not agree that more insulation was needed in the window cavity and said that \$100 each would be a fair price for removing each of the interior 17 window frames to make any repairs found necessary.

Didin reviewed the building inspection reports for this house and saw no references to framing or insulation and vapour barrier concerns set out thereon. He is familiar with the type of windows installed here and said that they meet the Ontario Building Code requirements. He did not agree with Smith's opinion that insulation was required in the cold room under the sunroom since that room is not a heated area.

Klinger stated that Sonsini was responsible for the choice of windows in the house and that Bruni installed this popular brand which met the 1987 standards of the Ontario Building Code. He said Bruni has done work for him for over 15 years and that there were never any problems about his work with owners or inspectors. As to the insulation, Klinger said that Skarlan Enterprises did that work and he has used that installer many times on R2000 homes. He said that Sonsini inspected one of the houses where Skarlan was working before Sonsini signed the contract to have the house built. Klinger says that he inspects a house before the building inspector arrives so as to minimize any infractions. He did so on this house and found no deficiencies as he checked the seal around the windows and doors, the vapour barrier and the caulking. He did not find the windows to be "out of square", and said that the use of particle board for shims was usual. He said that there is no means of access to put any insulation behind the shims from the inside of the house. In his opinion, there can no entry of water from the outside and that there is no value insulating inside the jamb extension into a room. Further since the trim is placed after the drywall is installed, there would be no ability to put in any insulation. Klinger stated that any cracking along the length of the window sills was due to natural shrinkage and this would be more likely if materials were at their greatest span. He noted condensation and stains in the sunroom and the kitchen and believes this was due to the high humidity inside the house which would be alleviated by leaving the sunroom doors open to equalize temperature in the rooms.

Klinger said that he was present and heard Smith's evidence and that he disagrees with Smith's conclusion. For Klinger, insulating the interior would not solve these problems as there is no evidence of any water inside the window cavities. There are no stains there and none on the ceiling of the sunroom, as Klinger recalls. On cross-examination, Klinger said that the reading on Sonsini's own humidistat showed "72" which was twice the humidity level which should exist.

Picard reviewed Sonsini's window complaints and the conciliation report findings. He said that the brick stop concern was aesthetic only as there was no frame close behind into which a nail could be driven. If the caulking did not hold the piece in place in future, he will ensure that a repair is done. Picard concluded that any present complaints by Sonsini are not warrantable due to natural shrinkage of materials and excessive humidity within the house. Picard saw no improper or incomplete installations of windows or insulation.

He and Mayhew looked into an open interior casing on July 27, 1988 and found no matting of insulation or stains which would show any water entering from outside the house.

Picard finds the frost stains on the lower areas of the window frames to be the result of high interior humidity and a lack of air circulation. Picard is familiar with Smith's report and disagrees entirely with any conclusion that water has penetrated through the ceiling or walls of the sunroom or that any water has entered through the window sills.

Picard says that the window sill slope is not a factor as any water entering through possible "pinhole" leaks would exit through the weepholes at the base of the walls. There is no mould, mildew or stains and he finds the condensation to be all on the surface and none to be concealed as Smith suggests.

On cross-examination, Picard said that air entry to a house was normal through the air space between the frame exterior wallboard and the exterior cladding of brick or siding. North winds would cause more air leakage on that side of the house in his opinion. He agreed that a diagonal crack in a window could be caused by a framed opening too tight without the 3/8" leeway on either side of the window. He agrees that a window could bind in its frame due to the framing shrinkage, and said that there was no need to remove every window casing as Smith suggests.

In cross-examination, Sonsini advanced his claim to resolve the window framing, condensation and insulation concerns at a cost of \$5,630; and he seeks as well \$250 to repair the master bedroom window. While Bowen suggested cutting bricks around the windows and other procedures, Sonsini would accept Smith's way of doing the repairs. He wishes to protect the value of his home which he sets at \$400,000 now whereas his purchase price in 1986 was \$203,964.

Counsel for the Program agreed that Sonsini relies on Smith's report of this item and she rejects Smith's conclusions of lack of attic and window insulation and water seepage from the outside. She asserts that the windows have been properly installed and insulated and that the cause of interior surface condensation is due to the lifestyle of the occupants.

She finds no defect in the Hunt/Pella windows which Sonsini chose and no failures resulting in any infractions of the Ontario Building Code. She saw no evidence of any windows scraping on sills which are warrantable concerns and notes that some window complaints were resolved in the cash settlements.

Counsel noted that Smith did not report any water stains on the ceiling of the sunroom or note any water entry. She said that the evidence of Collins, Bruni, Philion, Mayhew, Klinger and Picard all support the denial of this claim by Sonsini and that all warranted complaints in this area were repaired or cash settled.

She said finally that no evidence is before the Tribunal which would support the cost of opening all 17 window casings.

2. Kitchen window sill

Sonsini complained that this sill had swollen due to water entry around the window framing which caused the shims to swell. Cracking and the peeling of paint were noticeable said Sonsini and he referred to photograph 8. In the conciliation inspection report of August 13, 1987, this general item was placed on the unwarranted "A(2)" list, with the comment that "there was no evidence of any leaking at any of the above locations", where that reference was to the sunroom, the kitchen and the basement. The general comment was then made that "the homeowners are to contact the Warranty Program directly for verification should this problem occur in the future".

Sonsini noted that photograph 9 also showed this problem in the dining room window sill. He said that the problem had also existed in the bedrooms but repairs had been made. On cross-examination, Sonsini said that the problem continues although no further particular notification had been given to the Program.

Philion said that he had worked on this sill and that only the extension jamb was lifting. In conclusion, Sonsini said that repairs to this item would be included in Smith's price as set out under item 1 above.

Counsel for the Program stated that humidity from the sink could well affect the window sill above, and that repairs were done so that this is not an outstanding warranted item. She noted that the undated decision letter of Paul Picard stated:

Your complaint of the kitchen window sill was recorded on my June 13, 1991 inspection at your home. The extended window sill was bowed upwards excessively and the cause was found to be that the particle board shim used had swelled due to moisture penetration at a hole in the caulking along the sill of the window. This was rectified on site by the contractor hired by the Warranty Program.

I believe the situation to be rectified and no longer an issue.

3. Hump on kitchen floor

Sonsini's complaint here was more particularly described in the Proof of Claim of April 19, 1991 as "hump under kitchen table and slope under kitchen desk".

Sonsini said that this room is 28' by 13' which is the span of the floor joists.

At the conciliation inspection February 26, 1988, this complaint was placed on the Schedule "A(1)" of warranted items with the comment:

(5) Complaint: HUMP FROM WALL TO WALL UNDER KITCHEN TABLE

Observations: The eating area floor is vinyl covered and approximately four feet from the cabinets; the floor appears higher than at the cabinets. The difference at its most extreme point is approximately 3/4". The cause of this situation is not readily observed, however, the remedy of filling the hollow prior to laying of the new floor covering (see Warranty Program's letter dated January 20, 1988) is acceptable.

Sonsini said that there is not a hollow, but rather a hump resulting from a crowned joist. There is also a slope problem under the desk built in along the wall of cupboards, and this was referred to in the conciliation inspection report of August 13, 1987, when the complaint was placed on the Schedule "A(1)" of warranted items with the comment:

(15) Complaint: KITCHEN - FLOOR SLOPES CONSIDERABLY BENEATH DESK

Observations: The floor slopes approximately 3/4" beginning from 2 feet away just below the desk. The Warranty Program considers the situation to be excessive.

The builder shall take the appropriate measures required so that the floor meets the acceptable limits within the construction industry.

Sonsini has measured the hump to be 3/4" over a 2' length and referred to this matter in his letter to the Program of April 14, 1988, where he said:

- (5) HUMP FROM WALL TO WALL UNDER KITCHEN TABLE
- Mr. Picard stated that the remedy of filling the hollow prior to laying of the new floor is acceptable.

The contractor has stated in Mr. Picard's presence that he would not warranty such a repair. Why would this method even be suggested? While obtaining an estimate to replace the vinyl by another flooring company, it was clearly stated that they would not guaranty a new vinyl floor over such a large filled-in area such as this one. They did however suggest another method of repair.

On cross-examination, Sonsini did not recall if Bruni and Klinger had told him that a slope would occur since the wall over the beam had too great a load. He did not recall if a steel beam with a supporting post had been recommended.

Smith stated that the hump problem is caused by a crowned joist resulting from deflection due to joists which have not been "nailed off" and extend over a beam. He believes that one or perhaps two joists must be lowered and he would not repair this by using filler or plywood from above. He estimates the costs of these repairs to be \$1,500.

Bruni gave evidence of his suggestion for an extra beam or other support for the floor and said that repairs could be done now. Bruni referred to a letter prepared by his wife and sent to the builder on September 19, 1987 (Exhibit 9, tab 37) which stated:

Both Mr. & Mrs. Sonsini were present when we finished the framing and said everything was ok. We later came with you to repair some squeaks & one joist with a lump in the kitchen floor and put extra strapping & bridging in the basement when Mr. Sonsini was there.

We also said that the steel beam under the kitchen is not in a good position. The kitchen joist is too long and the support under the dining room wall is better with a steel beam and post.

We said that the steel beam in the kitchen could be lowered to make the floor come down, but that would be no good for the

walls above. Mr. Sonsini said to leave it all the way it is and not do anything.

I also remember that we discussed that during the framing period last year, to install an extra post and beam. We then came back in September this year to check on the windows in the bathroom and one bedroom upstairs and to lift the floor over the steel beam in the kitchen, but Mr. Sonsini said not to bother with that because he didn't want to remove and damage the kitchen cabinets.

Bruni said that some repairs had lessened the problem and that he would prefer not to fix this from above by planing off the top of the joists as they are at their maximum span and could be weakened. For the best job, Bruni would have preferred the joists to be on 12" centers and not on 16" centers.

McKay said that repairing a hump from a crowned joist is a routine job where the vinyl covering and underlay would be taken up, then the plywood subfloor would come up and be sanded while the crowned joist would be planed. This would take the least amount off the joist so as not to weaken it. He would repair the slope under the desk area by taking up the vinyl covering and then use a shaped piece of plywood with filler to level the area after which the vinyl covering would be replaced.

Mayhew agreed that the hump must be removed and would do this work from above as the vinyl floor covering is to be replaced anyway. He would repair the slope using the filler since jacking up the floor from below could cause drywall cracks which would be more expensive to repair. Mayhew said that careful use of a jack from below with a quarter-turn each week could do the job without wall cracks after which pieces of beam could be nailed on to the raised joists to carry the load.

Klinger confirmed Bruni's evidence that a steel post was suggested under the beam and said that this was not wanted by Sonsini and Hale. Therefore he said the beam was tripled for support. Klinger said there was no violation of any Ontario Building Code provision by the work which was done, however a steel post would have resolved any future problem where the joists intersect to create a possible slope. He said that the crowned joist is above the furnace area so that various ducts make repairs awkward, and would require some cutting into the top of the partition wall which surrounds the furnace.

Klinger would repair this problem from above as McKay described. He agreed that a steel beam or a steel post could be used, but that some crack damages to interior walls could then occur. On cross-examination, Klinger acknowledged that the repairs attempted did not lower the floor as much as was planned because constant weight on the joists is needed to prevent rising and the kitchen table is not heavy enough to have an impact.

Picard reviewed the slope and hump references in the conciliation inspection report set out above. As the vinyl is to be replaced, he would work from above as McKay and Klinger suggest. Picard said that a disagreement between Sonsini and Klinger as to the necessity of removing all of the kitchen cabinets and island and as to who should pay for this to be done prevented the resolution of this complaint.

In conclusion, Sonsini said that these problems of hump and slope are separate from the vinyl covering issue. He thinks that the use of a telepost would only shift the problem so that wall cracks would occur. He prefers the installation of a steel beam and would accept any damages by cracking as his responsibility.

4. Floor movement in upper foyer

Sonsini referred to the conciliation inspection report of February 26, 1988 when this item appears in the Schedule "A(1)" list of warranted items as follows:

(6) Complaint: - FLOOR MOVEMENT IN NUMEROUS AREAS

Observations: - SUBFLOOR IN UPPER FOYER NOT WELL SECURED
Three areas were specifically viewed and some movement in the subfloor was found.

The areas are as follows:

- 1) Entrance to master ensuite
- 2) In east bedroom by entrance.
- 3) Foyer side of northwest bedroom entrance.

No other areas were specifically referred to and the area of the upper foyer was found in general to be acceptable.

He wants the carpet lifted, more screws put in and the carpet replaced and he questions the use of drywall screws to be satisfactory for this task. On cross-examination, Sonsini noted

that this complaint is first referred to in his letter to the builder of December 4, 1987 and again appears in his Proof of Claim sent in on April 19, 1991. Sonsini says that Picard has known of this complaint over the years. Smith estimated a cost of \$180 to do the necessary repair work.

Klinger said that 1½" screws are used for this work and that the flat head of a drywall screw sinks into the subflooring better according to some users. Now that the house is six years old, the natural shrinkage of materials will cause some squeaking and movement especially where there is high humidity in a house, in his opinion.

Picard says that repairs were done for this item and no movement has been seen by him after three further years have passed. He said there is no Ontario Building Code violation in using one fastener or another and noted that a wood screw may hold better in particle board while in solid wood there is little difference between wood or drywall screws in their holding capacity.

In conclusion, Sonsini leaves this matter to the discretion of the Tribunal. Counsel for the Program said that repairs were done in 1987 and after these past years, there is no continuing warranty due to the natural shrinkage of the materials used. She referred to Section 13(2)(d) with respect to normal shrinkage and Section 13(2)(c) with respect to normal wear and tear; and stated that the application of these two sections of the New Home Warranties Plan Act require the disallowance of this claim.

5. Plumbing pipe through cold air return vent

Sonsini complained of the noise from water passing through this pipe and said the placing of the pipe amplified the problem. This pipe runs down the inside of the east wall of the dining room and this 4" wall is filled by the pipe so that any vibrations cause noise.

Sonsini presented a letter of January 31, 1990 from D. Pater, P.Eng., an advisor at the Ontario Buildings Branch of the Ministry of Housing which stated:

As we discussed by telephone, the workmanship requirements are not covered in the Ontario Building Code.

The practice of cross a 3½ plumbing pipe through a cold air return duct, as

described in your letter, would be considered poor workmanship and should not be allowed.

On the basis of this opinion, Sonsini relies for his complaint on the warranty in Section 13(1)(a) of the Ontario New Home Warranties Plan Act ("the Act") and subsection (i) thereof which states: "is constructed in a workmanlike manner and is free defects in material".

Smith said that while no Ontario Building Code violation exists here, the placing of this pipe was not good practice and he would insulate the area for \$250, so that the sound could be muffled and the cold air return could perhaps also be moved over to be between an adjacent pair of floor joists.

Mayhew said that this noise matter is neither an Ontario Building Code violation nor is it a workmanship issue in his opinion. Didin agreed that this was not a breach of any provision of the Ontario Building Code.

Klinger said that he agreed with Mayhew and Didin and that usually the plumbing goes in to a home before the heating system. Here the cold air return may have already been in place and moving this to the next joist will not help as the pipe's vibration will continue to cause some noise in an area that cannot be insulated now.

Picard thought that the plumbing was likely in place first, but sees no defect in workmanship and no Ontario Building Code violation here. As the pipe fills the space inside the wall, insulation cannot be fitted now. As the basement is open, the cold air return could be moved over one space to the north, he said.

In conclusion, Sonsini said that opening up the wall and creating a 6" space where the pipe could have insulation packed all around would be a solution which Smith could consider. Counsel for the Program denied any warranty for this complaint. She discounted the opinion in the letter from Pater and saw no violation of the Ontario Building Code for which this Tribunal should require a remedy.

6. Kitchen vinyl floor covering - patch and seams

Sonsini said that the Certificate of Completion and Possession had included a reference to "hole and scratch in kitchen vinyl" (Exhibit 6, tab 2). In his request for conciliation, the list of deficiencies dated July 28, 1987 refers to "vinyl floor damaged by sub-trades" and "extra seams and patches in kitchen vinyl floor when repairing the deficiency in this kitchen".

In the conciliation inspection of August 13, 1987, this complaint was placed on Schedule "A(2)" as an unwarranted matter with the comment:

(9) Complaint: PATCHES IN KITCHEN VINYL FLOOR

Explanation: Patching vinyl floor covering is an acceptable method of repair; in this case the repair work was done in a workmanlike manner and as such, the floor covering is acceptable.

In the conciliation inspection of February 26, 1988, the continued complaint was accepted based on a reference in a letter from the Program on January 20, 1988 which noted:

I have been in contact with both your builder, Mr. K. Klinger and the flooring subcontractor Mr. J. MacKay. The issue of the kitchen patterned vinyl flooring was discussed and both parties informed that the two (2) misaligned joins were unacceptable and require repair. It is also noted that "...scratches in kitchen vinyl" are noted on the Certificate of Completion and Possession.

From photographs 14, 15, 16 and 17, Sonsini showed the lifting of seams and the raising of edges at thresholds. There is also a mismatch of pattern which is obvious. Sonsini said that the builder would not replace the vinyl flooring as the centre island had to be taken up and there was a question over the need to remove all other kitchen cabinets and who would bear the cost of doing this work.

Sonsini said that \$3,159 was placed in trust on May 18, 1988 which would be paid out to Cityview Flooring when the work was done to complete carpet, vinyl and ceramic repairs. Klinger's lawyer has the funds and Sonsini, Hale, McKay and Klinger would all have to agree to their disbursement.

Sonsini said that the money in trust is there now for the cost of the new vinyl flooring which will have to be put in and the cost of any removal and replacement of the centre island. He does not see any need to remove the kitchen cabinets so that vinyl would be laid under them; and says that he had never suggested such a requirement so that Klinger's use of this as an issue was only to delay the necessary work.

Sonsini has received two estimates of \$3,200 and \$3,600 to replace the vinyl flooring so that he would accept the money and

arrange separately to have the work done. He believes that he should also receive any accumulated interest. As of September 30, 1992, the total in the trust account was \$4,425.15.

Counsel for the Program stated that if the funds were released to Cityview, then for that money McKay would do the replacement of the vinyl flooring after fixing the slope and hump problems from above and the island would be removed and reinstalled. Since Cityview has been without the funds for these years, any interest should be paid over as well, she said. Smith said that he is prepared to do the work upon payment of the money in trust plus the accumulated interest. Mayhew said that the Program would supervise the kitchen repairs and ensure that no damages occurred to any of the cabinets.

Klinger agreed that the vinyl flooring in the kitchen is warranted and will be replaced. The slope and hump problems would be resolved at the same time as set out earlier and he sees no need to take out the kitchen cabinets. Klinger would agree to release the total monies in trust to Cityview in order to have all work completed under the supervision of the Program.

Picard reviewed the kitchen vinyl flooring concerns and agreed that the kitchen cabinets did not need to be removed. He said that differences between Sonsini and Klinger led to this impasse as Picard had thought that the request to have the cabinets removed had come from Sonsini. However, he said that the repairs can not be ordered until the monies are released since this is a benefit available to the owner under Section 14(2) of the Act.

Picard suggested that Sonsini, Hale, Klinger and McKay agree to release the monies in trust to the Program to be held pending satisfactory repair of the hump, slope and vinyl flooring complaints by Cityview under the supervision of the Program; after which the total of funds would be paid to Cityview. If Sonsini and Hale did not accept this, the Program would have the claim denied based on the set off of a benefit available to Sonsini and Hale.

On cross-examination, Picard agreed that the Program has no jurisdiction over the monies in trust and can only suggest a resolution. If the parties cannot agree, then the monies would continue to stay in trust as they have for the past five years.

In conclusion, Sonsini said that the \$3,159 should be applied solely to replace the kitchen vinyl flooring. He would accept the money with the interest thereon and arrange to have the work done himself; while continuing to require a resolution of the floor slope and hump problems. Sonsini does not want the Program, Cityview, Klinger or Phillion in his house again. If the work can be done for less money, he would accept a cash settlement and the

Program could keep the balance of funds from the \$3,159; but he wants the interest which has accumulated.

Counsel for the Program says that an offer has been made to resolve the vinyl flooring, hump and slope complaints as set out by Picard. The money in trust belongs to Cityview which should receive the interest as well, she said, and if no monies were held in trust the Program would have directed the repair work to be done. There is enough money in trust to do the work, she said.

7. Heating System

Sonsini said that this complaint was referred to in the conciliation inspection report of February 26, 1988 where it was put on the Schedule "A(2)" of unwarranted items with the following comments:

(20) Complaint: - HEAT PUMP NOT FUNCTIONING PROPERLY

Explanation: After speaking to Mr. D. Buttle of Ottawa Air Design Limited, who is the accredited service company for this unit, it is found that no defect exists. The request for an "outdoor stats and emergency relay switch" to be installed is not warranted as the manufacturer states this is optional equipment and as such not a requirement. Mr. Buttle also claims that a service representative inspected the unit on February 21, 1988 and that the unit at that time was operating as per the manufacturer's specifications.

At conciliation, there was some presence of ice and snow below the fan of the unit, however, had bent the heat dissipation fins slightly at the bottom, however, I do not think this will adversely the function of the finds. In any case, the owner's manual specifically states that in the case of excessive ice build up, one should contact a service man.

Sonsini then produced photographs 26, 27 and 28 which showed ice damage, the deterioration of fins at the bottom of the heat pump and a dent in the top cover of the heat pump. He said that a further reference in the report was in Schedule "A(2)", item 11:

(11) Complaint: - ICE FORMS IN LOWER CORNERS OF WINDOW FRAMES

- TEMPERATURE IN SUN ROOM DROPS TO OVER
20 degrees BELOW SETTING

Explanation: The sun room is located at the northeast face of the home and actually juts out from the home. Three of the elevations are 90% glass and there is a cold storage area below. In point of fact, this room is surrounded by five cold surfaces and has only one warm air vent. As such, when the room is closed off from the remaining areas of the home by the French doors, it is quite likely that this area may be colder than other areas. However, it is the owner's responsibility to finish their own comfort levels. The design of the heating system is not an item within the Warranty Program's mandate to conciliate.

The condensation or ice build up on the windows was not viewed at conciliation. However, humidity levels are to be controlled by the owner. No excessive air leakage around the windows was felt on this day.

Sonsini then reviewed the sixteen letters and visits over four years back and forth which involved the builder, the installer, several repair persons, Ontario Hydro and the Program.

These took place because of wiring errors for this equipment and the incorrect sequencing of the various stages of operation. He referred to Picard's letter to him of March 21, 1989 wherein the Program "is willing to absorb the cost of installing the 'heating sequencers' and 'T-Stats', should you arrange to supply them". A question arose as to the correct size of a heat pump for this size of house, said Sonsini.

Sonsini believes that his heat pump is damaged and that the original installer in 1986 was incompetent. After six winters of discomfort and nuisance, Sonsini claims that the system does not have a proper wiring diagram and that he fears that CSA approval is no longer valid which may cause a concern to a new buyer of his house. Sonsini wants a new furnace and heat pump installation and Smith advances the estimate of \$6,125 to replace this, as that was the original contract cost.

On cross-examination, Sonsini agreed that the heat pump runs at all times and there are two banks of heaters in the furnace which come on in sequence if required. He said that the machinery is working now, but he remains concerned that it may be undersized and that there is no Canadian dealership for the machine.

His electric furnace may now not be CSA approved after the wiring was redone.

Grant knows the Rheem equipment installed here and explained the operations of the equipment. He visited the house on February 24, 1990 to inspect, replace a valve and adjust the defrost control. He said that the heat pump unit is large enough for this house and he rewired the furnace correctly to place it in a factory standard. The whole unit operated properly when he turned it on. On October 9, 1992, he did a maintenance check and cleaned the air filter while checking gas pressures. The fins in the heat pump were satisfactory and there is no need to replace the heat pump in his opinion. Grant said that a CSA label could be obtained for this equipment through the distributor or Ontario Hydro would send someone out to do a field inspection for a fee of \$75 after which a CSA label would be attached if all was in order.

On reviewing the analysis of the system, Grant finds that the heating system is slightly oversized at 24,000 BTU since 22,600 is needed, while the cooling system is slightly undersized as 36,000 BTU are produced when 37,643 are needed. Since the next size in unit provides 42,000 BTU, the present system does need to run somewhat longer to provide the cooling, however this is a bonus for a cool dry house. Grant concludes that the system as installed does not violate the Ontario Building Code and that the heat pump is not too small.

On cross-examination, Grant said that fins in the heat pump may be slightly distorted, but continue to operate. The standard warranty for these items is one year for parts and labour and five years for the compressor, he said.

Picard said that he was not able to confirm any defect in the heating system at the conciliation inspection of February 26, 1988. Now the system is working well, so Picard does not know what could be complained about or repaired. The Program would agree to pay the Ontario Hydro inspection fee of \$75 to obtain the CSA label, but only to meet the 1987 standard. If the standard has changed, the Program would not pay any cost to upgrade the system to current standards.

On cross-examination, Picard repeated that this is not a warrantable item since the system is operating without any problem.

In conclusion, Sonsini wants Grant to visit the house and to obtain CSA inspection approval from Ontario Hydro for the equipment, with the Program to pay for this. Since this equipment has had six years of rough life in a likely 10 years lifespan, Sonsini wants a new unit worth \$2,976 in 1986 with Grant to install it for a total claim of \$2,400 plus \$1,000 today.

Counsel for the Program said that there is no evidence of any current defect in the heating system and that there is no evidence of any violation of the Ontario Building Code which has been shown. She said that there is no evidence of the unit being undersized, of CSA Standards being unmet or of dents to the fins being a problem.

She noted that Grant was at the house on February 24, 1990 and on January 25, 1991 to do repairs and maintenance, and that the Program paid for those visits. He was there again on October 9, 1992, and states that the system was of adequate size, operates without any defect and should not fail to obtain a CSA label after an inspection. He says that there is no reason to replace the heat pump or the cover on it. She repeated the offer to pay for an Ontario Hydro inspection in order to obtain a CSA label as at 1987 standards.

Finally, counsel for the Program stated that Smith's \$480 estimate to insulate the cold room is not a warrantable item, was not brought to the Program in writing in the first year of occupancy and does not show any Building Code violations.

After considering the evidence provided, and hearing the conclusions of Sonsini and of counsel for the Program, the Tribunal has reached the following decisions:

1. Window framing/insulation/condensation

We accept that there is no Ontario Building Code violation or proven defect with respect to the manufacture and installation of the windows in this house. The jurisdiction with the authority to consider and approve the framing and other matters rests with the Municipality and such approval has been received. We accept the view that the excessive condensation in this house is due to the lifestyle of the occupants and the excessive humidity leads to this natural result. We direct the Program to disallow this claim.

2. Kitchen window sill

We find that this item has been repaired and that no warrantable defect exists now. We direct the Program to disallow this claim.

3. Hump on kitchen floor

6. Kitchen vinyl floor covering - patch and seams

We find that these are warranted items and must be repaired and we accept the proposal of the Program to fix from above the hump and slope problems and to place new vinyl flooring

in the kitchen. Whoever does this repair work is to be closely supervised by the Program to ensure that no damage is done and that the work meets the standards of the Ontario Building Code. We conclude that the responsibility of the Program to have this repair work completed depends upon the concerned parties paying all of the monies held in trust to the Program and if this is not done within 60 days of this decision, we direct the Program to disallow this claim.

4. Floor movement in upper foyer

Since this is not a major structural defect and since three years have passed after repairs were done, we find that this is not a warranted item and we direct the Program to disallow this claim.

5. Plumbing pipe through cold air return vent

We find this claim to be acceptable as an issue of workmanship and we direct the Program to relocate and close off the existing air vent opening or to pay to Sonsini the sum of \$150.

7. Heating system

We conclude that this system has been functioning satisfactorily since February 24, 1990 so there is nothing to replace or warrant. We direct the Program to disallow this claim for a new heat pump and we accept the Program's offer to pay for the Ontario Hydro inspection in order to meet 1987 standards.

Accordingly, by virtue of the authority vested in the Commercial Registration Appeal Tribunal under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program:

- a) to disallow Sonsini's claims 1, 2 and 4;
- b) to allow Sonsini's claims 3 and 6 if the monies in trust are paid over to the Program to be distributed after necessary work is done;
- c) to pay Sonsini the sum of \$150 in settlement of claim 5;
- d) to pay \$75 for the Ontario Hydro inspection of the furnace and to obtain a CSA label so that the standards of 1987 are met, and to otherwise disallow Sonsini's claim 7.

DAVID SOSIAK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding

APPEARANCES:

No one appearing for the Applicant

STEPHEN MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16, July 1993

Toronto

REASONS FOR DECISION AND ORDER

No one appearing for the Applicant by 10:00 o'clock in the forenoon, upon the application of Counsel on behalf of the Respondent, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicant.

The above decision and reasons therefor were orally given by the Vice-Chairman at the conclusion of the hearing.

C.H. SPRING

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
SELWYN CHARLES, Member
JOHN HURLBURT, Member

APPEARANCES:

C.H. SPRING, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 4 December 1992

Toronto

REASONS FOR DECISION AND ORDER

This is a case in respect to a claim for Building Code violations of a home constructed at 893 Copperfield Drive, Oshawa.

The issue in this hearing may be simply stated as follows: Does the delay of the homeowner disentitle him to relief even if otherwise a valid warranted claim exists?

The facts of this case are that the homeowner took possession on August 1, 1986. By letter dated September 16, 1986 a written complaint was filed with the Program by the homeowner in which complaint was included a claim for a leaking basement. Subsequently, conciliation took place on November 26, 1986 at which time the homeowner informed the conciliator that the builder had made some substantial repairs including digging up part of the basement and there was no leakage at the time of the conciliation. The conciliator in his Schedule "A(2)" item 58 made the following observation:

Could see indications of water stains on the floor of the basement along the east wall and along the block wall between two upper levels and lower level split of the basement. Homeowner said at time of inspection that this area has not leaked

for some time as the builder has come in and repaired.

Because of these observations, the conciliator placed this complaint in Schedule "A(2)". There was a further comment, however, to both the homeowner and builder as follows:

Homeowner is to monitor these areas and if they leak again by May 1st, 1987, he is to contact his builder and the Ontario New Home Warranty Program.

The Program by letter dated December 16, 1986 forwarded to the homeowner a copy of the conciliation report in which the Program indicated that it had notified the builder to commence work on the warranted items and advising the homeowner that it was his responsibility to notify the Warranty Program if the builder did not respond within the specified time. The letter further indicated that if there was no such notification, the Program would assume that the builder was either processing the completion of the work or had resolved the warranty problem. The homeowner returned this letter under date of January 12, 1987 indicating that the builder had not completed all of the work and setting out certain details.

By letter dated March 16, 1987, the homeowner advised the Program that leakage continued. Internal notes of the Program indicated telephone communication during March and April by the Program with the builder and with Mrs. Spring in respect to this particular item. The last notation is dated April 16 and indicates that the Program had a telephone discussion with Mrs. Spring in which certain items in respect to the conciliation had been completed. There is also a further notation that the builder advised that he would be back the end of June or July and to give him a call or write him and he would be back. The file was closed that same date April 16, 1987. Whether the builder reattended at the site was not before us in evidence. Neither the homeowner or a representative of the Program confirmed or denied any further attendance.

Subsequently in October 1990 some three years later, leakage in the same location in the basement reoccurred and the homeowner according to a witness from the Program telephoned the Program in the fall of 1990 and, in any event, submitted a notification in writing in June 1991. The witness for the Program testified that he attended the homeowner's premises on June 7, 1991 where the homeowner had dug a trench adjacent to the wall of the house. The Program's witness examined the trench and the location of the weeping tiles. He candidly testified that the installation was contrary to the Ontario Building Code and that if he had

observed such a situation within the warranty period, he would have directed remedial installation to take place. The Program forwarded a letter under date of August 9, 1991 to the homeowner. In that letter, reference was made to the conciliation of November 26, 1986 and the obligation of the homeowner to report to the Program with respect to leakage on May 1, 1987. The letter went on to say, "I understand that there was no leakage until October of 1990." The letter further went on to say that, "From my information the basement did not have any leakage problems until October 1990, approximately 4 years after our conciliation meeting of November 1986, and the repair made by the vendor/builder."

Because of an objection by the homeowner, a further letter was sent from the Program under date of September 23, 1991 in which the manager of the Whitby office reviewed the matter and stated, "...that subsequent to the builder's repair in the fall of 1986, no further leakage occurred until October of 1990." It should be noted that these factual statements in the letters of the Program in September 1991 were incorrect given the complaint issued by the homeowner on March 16, 1987 and the internal records of the Program dealing with April 1987.

Counsel for the Program submitted that while no time period is specified in the Act with respect to repairs, nevertheless it has developed as a practice of the Program to apply a similar warranty as is contained in the Act with respect to repairs to warranted items and this has been followed in a number of the Tribunal decisions such as the A. Talosi decision released April 24, 1991.

In addition to the Talosi decision, counsel also referred to the decision of Rod Senior released December 4, 1992. In the latter case, Mr. Senior was absent from the country for approximately four years. During that time, he had a solicitor and real estate agent acting for him in respect to his home. He also had a builder attend on a conciliation. As a result, certain repairs were ordered to be effected and when the builder failed to do so, the Program arranged for the completion of these repairs. During the subsequent period, Mr. Senior had three separate tenants in occupation of the premises. One tenant for two years and two tenants for each single year subsequent thereto. As indicated, he also had a solicitor and real estate agent assisting in the management of this property. On his return from England, he lodged a complaint with respect to the repairs undertaken in his absence. The nature of the complaints showed the problems to be very obvious and yet not one of the tenants, the solicitor or real estate agent had ever voiced any complaint to the Program during the interval. In the Talosi decision, there were three separate floors installed one on top of each other to rectify a problem in the Talosi's home. Again these floors were in very observable

position and no complaint was made until several years after the final installation.

The circumstances in the case before us are quite different. It would appear that no repairs were made, at least no evidence was presented to us to indicate that such occurred after the complaint of March 16, 1987 and the nature of the problem as observed by the Program's representative in 1991 in that it was a Building Code violation, made the observation of the improper installation impossible without an excavation taking place. While latent defects are not covered under the warranties in the Act specifically, the circumstances in this case do make the nature of the problem substantially different from that in the cases cited to us.

In summary, the circumstances in Mr. Spring's complaint to the Program are as follows:

1. The original complaint was filed in time.
2. Evidence of extensive repairs at the time of the conciliation existed and the Program notified the homeowner to advise by May of the following year.
3. On March 16, 1987 the homeowner gave further notice to the Program.
4. The file was closed by the Program on April 16, 1987 with no follow-up by the Program or the homeowner.
5. The problem when exposed was a Building Code violation and would have been warranted if found in 1987 or a later date if the Program had been unable to deal with the matter in 1987.

This Tribunal is aware that in many cases, the Program has looked very carefully at leaking basement conditions. Often times the Program has conducted exploratory excavation and if the Program had done so in this case, the Building Code violation would readily have been observed. Were there any signals to the Program which should have alerted it to take some action? The Tribunal is of the opinion that there were. When notified in March 1987 of a leaking reoccurrence, the very concern identified in item 58 of the A(2) Schedule by the Program conciliator should have been a signal to the Program that either the repairs made prior to the conciliation were improper and had failed or at least were ineffective to resolve the problem.

Either of these conclusions should have led the Program to suspect that something was amiss. Yet the Program did nothing to confirm this simply relying on a telephone call that the builder would do something in June or July 1987. Instead of closing the file, if the Program had followed up the concern identified, the Building Code violation might very well have been determined and effective repairs of a warranted claim might have been made. In most cases, when work is to be done by the builder the Program sends a letter to the homeowner confirming this and requesting a report from the homeowner as to whether, in fact, this has been done. In fact, such a letter was sent out following the conciliation in 1986 and it would seem logical that a similar letter should have been sent confirming that work would be done later in the year particularly considering the nature of the complaint and the potential seriousness of leaking basements. Instead the file was closed and put away.

It is certainly true that the homeowner did not follow-up with the Program and one has to consider that there is some obligation upon the homeowner to follow up work which is expected to be done. This Tribunal is concerned, however, that in this instance there was no alerting by the Program of the homeowner that work was to be done and to respond as to whether such was done or not as had previously been stipulated by the Program in December 1986. In the view of this Tribunal, the problem having been further identified by the homeowner might lead the homeowner in the absence of specific notification in writing from the Program to believe that no further action on his part was necessary, that the matter was in hand by the Program.

In the specific facts of this case, the Tribunal is of the view that the Program has failed this homeowner in the following respects: it failed to investigate the recurrence of the problem after having been advised on March 16, 1987; it failed to notify the homeowner in regard to this issue; it closed the file without following up the complaint as to whether or not repairs had been effected.

It has been identified in the Talosi case that the Program should not be on the hook for an indefinite period. Similarly, this was the decision in the Senior case. This Tribunal fully agrees with this proposition. In the case before us, however, given the nature of the defect and the inaction of the Program, the Tribunal is of the view that there was an onus upon the Program greater than that upon the homeowner to deal with the issue in a prompt manner. In particular, the Tribunal is of the view that section 4 of Regulation 726 applies to the specific claim filed by the homeowner under date of March 16, 1987 which requires the Program promptly to respond. It is the view of this Tribunal in the specific circumstances of this case that the Program has

failed to discharge its obligation under section 4 of the Regulation. Had the matter been dealt with by the Program and the amount of time elapsed subsequently, then the Tribunal would not be prepared to allow the claim of the homeowner. But in the circumstances of the case, pursuant to the authority vested in it, the Tribunal hereby directs the Program to effect the appropriate repairs of the Building Code violation with regard to the installation of the weeping tile in this home.

E. STRASSLER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

STEVEN WEISS, representing the Applicant

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 24 March 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a decision letter to the Applicant from the Program dated January 21, 1992. The relevant facts are somewhat unusual.

By an Agreement of Purchase and Sale dated 25 August 1990, the Applicant and his wife purchased the property in question from Imperial Homes (673914 Ontario Inc.). Nothing turns on the point that the Applicant's wife is a co-owner of the property and is not a party to these proceedings. The case proceeded on the basis that if the Applicant were able to establish his claims, he should recover them in full without his co-owner being part of these proceedings. The evidence established that the building consisted of a basement and two storeys above the basement constructed upon the foundation walls of an older building which had been on this site at 850 Ossington Avenue in Toronto and had been demolished to provide for this new construction. The evidence also established that the whole of the construction was new except for these old foundation walls.

There was a real issue between the parties as to whether the dwelling house bought by the Applicant contained two or three self-contained one family dwellings. The Agreement of Purchase and Sale contains a description in the opening paragraph of the building as being "a detached, brick, two storey dwelling having a lane at the rear, being a legal, converted two unit dwelling." The evidence disclosed that the Building Permit was obtained for the

building of a duplex or two-unit dwelling. On the other hand, in Schedule "A" to the Agreement of Purchase and Sale there are nine references to three items which indicate it was actually built for three self-contained one family dwellings, it having three individual electric meters, three hot water tanks, three separate entrances, three door bells, three smoke detectors, three bathrooms, three kitchens, three lights "from each apartment" at the rear of the property to light the driveway and three mailboxes. It was also clearly established, that after the Applicant took possession of the premises he arranged to get three separate tenant's families, one living in each of the three separate apartments found in the basement, the main floor and on the second floor. Subsequently, the city authorities discovered the building was being used as a triplex and took legal action against the Applicant, one of the results of which was an order against the Applicant prohibiting the renting of the basement as a third dwelling unit and since that time, there have been in fact only two self-contained one family dwellings in the building.

The transaction of purchase and sale was closed on November 29, 1990 and the Applicant immediately arranged to get three tenants in the building, one in each of the three units as aforementioned. In March 1991, the defect in the premises which led to these proceedings first manifested itself. The Applicant received a telephone call from the tenant in the basement apartment advising that water from the sanitary sewer was backing up through the drain in his floor. The Applicant immediately went to the premises and saw that this was happening and then immediately called a drain repairman who used a tradename "Roto-Rooter" who came on March 7, 1991 and cleared the blockage in the sanitary sewer pipe which ran from the house with an electric snake with a 1" cutter. His work and his recommendations are set out in his invoice in the words "Ran electric snake in C/O in furnace room, clearing blockage at 35 feet with 1" cutter. Ran snake with 3" cutter, would not go, pipe is broken and needs to be dug up." When this work was finished, the drain was working. Roto-Rooter rendered a bill for \$107.00 which the Applicant paid.

The Applicant did not follow the advice to dig up the broken pipe, but waited to see if the clearing of the drain by Roto-Rooter would solve the problem. It did so for about three weeks or so when the drain began backing up again. This time the results were more serious to the basement apartment as a quantity of raw sewage came up through the drain into the apartment. The Applicant wished to get a second opinion as to what was wrong and called another repairman from Brothers Plumbing Company Limited who attended on April 7, 1991. The result of his work is set out in his invoice and reads: "Service call to snake main drain. Reached approximately 33'. Hit blockage. Could not open.

Blockage is on city property." This company rendered an account for \$80.25 which the Applicant paid.

The Applicant then got a company called Gold Diggers Contracting. The address shown on its invoice is that of Roto-Rooter and I was told the principal was the same person. This contractor then did what had been advised earlier. The job description in its invoice was "To dig and repair main sanitary line. Take out trap and install clean-out. Broken trap." The total bill for this work was \$1,926.00, which the Applicant paid. When this second flooding occurred in April, the basement tenant called the City of Toronto Health Department and an inspector from it attended at the premises apparently on April 8, 1991. A copy of this inspector's report indicates that the complaint was "Blocked drain - sewage back-up - human excrement flooding apartment." The report goes on to say that when the City officers attended at the premises, they found the problem was not a City problem and that the landlord had agreed to get a plumber to fix it immediately and in fact the landlord did this. The report ends with a recommendation for an Order to remove the health hazard and the blocked drain forthwith. A formal Order was issued on April 10, 1991 stating:

The following are the reasons for this order:

1. The existence of an obstructed drain resulting in raw sewage backing up into the sanitary facility, the laundry room and the front porch of the basement unit.

Therefore, you are required:

1. Repair the drain blockage such that raw sewage is no longer backing up into the premises.
2. Clean, sanitize and repair all affected areas of the premises.

You are ordered comply with this Order forthwith.

This last Order was redundant by the time it was made because the Applicant was already proceeding to have the necessary work done. The repairs effected by Gold Diggers Contracting appear to have been completely satisfactory and no problem has been encountered since.

However, a considerable amount of damage was done to the basement premises by the flooding which did take place and by the repair work done by Gold Diggers Contracting which required extensive remedial work. To do this work, the Applicant contracted

with All-Canadian Renovations Limited. In an invoice dated May 8, 1991, this company's work is described:

TO PERFORM THE ABOVE WORK AS REQUIRED AND REQUESTED:

BATHROOM: Disconnect and remove vanity.
 remove damaged drywall on wall behind vanity
 and side wall; dispose
 replace drywall & tape as necessary
 Supply and Install baseboard and quarter round
 as necessary
 repaint
 replace vanity and sink.

LIVING ROOM:

remove baseboard, quarter round and damaged drywall;
 dispose
 replace with new drywall and tape as necessary
 replace baseboard and quarter round
 repaint

EXTERIOR: remove mud fill as necessary
 supply and install crushed limestone, sand
 reinstall paving stones

A total charge of \$1,567.55 was rendered by All-Canadian Renovations and it was paid in full by the Applicant on May 10, 1991.

The Applicant said that while all the work was going on, he arranged for the tenant and his family to go to a hotel at his, the landlord's, expense. He did not make any claim in this proceeding for this expense.

Unfortunately, all of this work in April did not make an end of the Applicant's troubles flowing from this problem. In August 1991, there developed a bad smell in the basement, mold on the basement walls and an infestation of flies. The Applicant called for All-Canadian Renovations Limited to come back and see what the trouble was, but the representative of that company refused saying that it had done its work and would do nothing more. The Applicant then called another contractor, Good Hope Construction which came in and did work which was invoiced in two invoices. The first of these dated August 8, 1991 was stated to be for:

- 1 remove water damages walls
- 2 install same
- 3 to remove damaged pipe and install
- 4 install...pipe and install...for toilet
- 5 to install one new flange

- 6 ...toilet set install
- 7 to paint all new walls in basement

For this work a charge of \$1,800.00 was rendered and paid by the Applicant.

The second of these invoices was dated August 14, 1991 and was stated to be for:

- 1 On the north side of building excavated approximately 3 ft depth by 2 ft on one side, parge complete wall.
- 2 On the other side parge wall
- 3 Back fill same and install
...
Price complete for material and labour
One year guarantee

For this work a charge of \$1,700.00 was rendered and paid by the Applicant.

In the result, nothing turns upon this issue in these proceedings, but it does appear that some if not all of the work done by Good Hope Construction was work which should have been identified and done by All-Canadian Renovations Limited or was work which became necessary by reason of the fact that it had failed to locate and clean-up dirty water under the raised floor in the basement which over a period of time in the summer resulted in the complaints above-mentioned and additional damage to the premises.

The Applicant tried to get the builder from whom he bought the building to do something about the problem without any success and when that failed, he had his solicitor make a claim on the Program. This was first done in a letter dated November 1, 1991. This letter was within the time limited by Section 13(4) of the Ontario New Home Warranties Plan Act and gave notice of the problem with the plumbing at the location and enclosed copies of the aforementioned invoices from Roto-Rooter, Gold Diggers Contracting and All-Canadian Renovations Limited and asked for payment of the same. The invoices from Brothers Plumbing Co. Ltd. and Good Hope Construction were not included in the claim at that time.

There had been an earlier contact with the Program, but not in writing. Joseph Strassler, the son of the Applicant, gave evidence to the Tribunal that sometime from the middle to the end of the summer of 1991 (presumably sometime in August), he had personally attended at the Program's offices and enquired about the making of this claim. He said that he had met with someone whose name he had as Willie Moskowitz, an officer of the Program. This

officer had enquired whether the Applicant had taken possession of the premises while they were empty or if they were already rented indicating that if they had already been occupied (which was not the fact), the purchaser would not be covered by the warranty. Mr. Moskowitz also told him that he thought there would be no coverage because the building had incorporated the old foundation walls. Mr. Joseph Strassler said the officer said nothing to him at that time to the effect that coverage would be denied because the Program was not notified until after the defects had been remedied and the remedial work done. He did confirm that the builder had enrolled it with the Program and there was an enrollment number.

On November 28, 1991, the Program responded to the Applicant's solicitors letter of November 1 stating that it could not assist the Applicant because "The Warranty Program will not pay invoices for any work the homeowner does on his own without being given the opportunity to inspect the complaint." The solicitor countered this position by stating that all of the work done was of an emergency nature and that the Applicant could not wait for an inspector. The Program rejected this explanation and in its formal decision in the letter of January 21, 1992, it says:

As I stated in my letter of November 28, 1991, the Ontario New Home Warranty Program will not pay invoices for any work the homeowner does on his own without being given the opportunity to inspect the complaint, as per Section 13-2(a) of the Ontario New Home Warranties Plan Act, which states "defects in materials, design and workmanship supplied by the owner".

As your clients proceeded to have the repairs to their plumbing completed by their own contractor, it is the decision of the Warranty Program that they are not responsible for any expenses incurred.

Upon all of the foregoing evidence, certain factual and certain legal issues arise. The factual issues to be determined are;

1. Did the real property which the Applicant and his wife purchased by the Offer of Purchase and Sale aforementioned have or include a "home" within the definition set out in Section 1(d) of the Ontario New Home Warranties Plan Act, and more specifically did it comply with the requirement of Section 1(d)(ii) thereof as being a building composed of more than one and not more than two self-contained one family dwellings under one ownership.

2. Were the repairs effected by the Applicant of an emergency nature and did the situation presented by the back-up of the sanitary drain render it impossible or impractical to give the Program an opportunity to inspect the defect and the damage done before the remedying of it?

Legal issues raised are:

1. If the answer to the first listed factual question is that the building was not a "home" as defined in Section 1(d) does this result in this transaction not coming within the purview of Section 1(a), the definition of a "builder", or of Section 1(n), the definition of an "owner" and therefore is the result that the claim does not come within the purview of either Section 13(1) or Section 14(1)(b).

2. Did the incorporation of the old foundation walls into the new building have the effect of taking the building out of the definition found in Section 1(a) with the result the claim does not come within Section 13(1) or Section 13(1)(b) as aforementioned?

3. If the building is not a "home" within the meaning of Section 1(d) or if Imperial Homes is not a "vendor" within the meaning of Section 1(n), is the result that the Applicant is not an owner meaning the meaning of Section 1(g) with the equally fatal result to this claim?

4. Was the failure of the Applicant to comply with the requirements of Section 5 of Regulation 726 fatal to the claim as alleged by the Program:

5.(1) An owner who requires conciliation of a dispute between the owner and the vendor shall make request therefor to the Corporation and both the owner and the vendor shall each pay to the Corporation the applicable conciliation fee set out in Schedule A.

5. In these circumstances should the Program be estopped from relying on the principal ground put forward by it in its decision letter, namely, the failure of the Applicant to allow it to inspect the defect and the damage and to follow its established procedures thereafter to deal with the same?

In dealing with the first factual issue as to whether the building complies with the requirement of Section 1(d)(ii), I must find that the Program should succeed with its contention on this point. While generally I was impressed with the honesty and straightforwardness of the Applicant in giving his evidence, I cannot accept his evidence that he believed he was buying a duplex

or a building of not more than two self-contained dwelling units. All of the references in Schedule "A" to the Offer of Purchase and Sale refer to the three separate items of many in the list, and the fact that upon getting possession, he immediately secured three separate families as tenants in the three different apartments allows of no other conclusion but that he bought this property in a state where there were to be three self-contained one family dwellings, that he took possession of it in that state and indeed immediately rented each of the three to separate family units, and finally that he was charged by the City with a breach of the relevant By-laws or Regulations in this regard and required to comply with them by getting rid of the basement floor tenants.

Also on the other factual issue whether the Applicant was excused by an emergency from notifying the Program, I must find the facts against the Applicant's position. There was urgency to do something on March 7 when the Applicant called Roto-Rooter, but this did not result in any action which rendered it impossible for the Program to make an inspection and to follow its prescribed procedures. Three weeks passed before anything further was done and while again there was urgency, the Applicant could have notified the Program of the situation when it could still have made a proper inspection and issued such directions as it considered appropriate.

It is not necessary to deal with all of the legal issues raised because it is clear that the Applicant's claim fails by reason of failing to come within several of the necessary definitions in Section 1 of the Act. Upon the findings aforementioned, the building did not come within any of the four clauses of Section 1(d) and was, therefore, not a "home" within the meaning of the Act. It is therefore not a "completed home" within the meaning of Section 1(a), the Applicant is not an "owner" within Section 1(g) who acquires a home from its vendor within the meaning of the Act and Imperial Homes was not a vendor of a home within the meaning of Section 1(n) as it did not sell a home within the meaning of the Act.

I should also deal with the issue of the incorporation into the building of the old foundation walls from the previous building on the property. I was not referred to any authorities on this particular point, but during the argument both counsel have made the submission that the warranties provided by the Act either cover the completed home in these circumstances or they do not cover it at all. In other words, it is not a question of the new work being covered and any old work incorporated not being covered (in which case it would have been vital to know if the sewer pipe which broke was part of the older building or part of the new installation), but rather a question of whether any new building which includes part of an old building is covered (and all covered)

or not covered (no part of it having any coverage). In determining this question, I can only have recourse to what appears to be a proper interpretation of the meaning of the words used in Section 1(a) of the Act:

- 1(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

While one may argue that the Legislature should have extended the coverage to all new buildings incorporating part of old ones on the basis that if a builder is to use part of an old building he must take the responsibility of warranting it sound for the purpose, this is not the question before the Tribunal. The question is not what the Legislature should have said, but rather what did it say? I have come to the conclusion that a plain reading of the words used restricts the definition of a "builder" for the purpose of this Act to one who builds the whole of a new home and does not include one who incorporates in it any significant part of some other building.

Having reached these conclusions, I must find that the Applicant's claim does not come within the warranties provided in Section 13(1) and do not support a cause of action within Section 14(1)(b), the building is not a home, the Applicant is not an owner and Imperial Homes is not a vendor within the required definitions of this Act.

Therefore by reason of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

MALKESH TAHEEM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
JOHN HURLBURT, Member

APPEARANCES:

MALKESH TAHEEM, appearing on his own behalf
(through an interpreter Mardeeb Dandal)

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 29 January 1993

Toronto

REASONS FOR DECISION AND ORDER

This is a claim by the Applicant with respect to a home at 34 Humming Bird Court in Brampton. The claims are in respect to cracks in the quoining on both sides of the garage face and cracks in the basement foundation walls. The Applicant complained particularly of water penetrating into the basement through the cracks and the tie holes in the basement foundation. It was acknowledged that the home was completed and first occupied on July 17, 1987. Mr. Taheem testified that he had purchased the home from a previous owner, not the builder, on November 26, 1990 and the first claim filed in writing with the Program was made April 21, 1991. In view of these dates, although the garage wall is severely out of plumb, no claim had been made in respect to faulty workmanship within one year from the date of possession. Although the evidence from both Mr. Taheem and the representative of the Program indicated that there had been some water penetration into the basement, again no claim for water penetration under Section 18 of the Regulations had been made within two years of the date of possession. Accordingly the only claims left to Mr. Taheem under the provisions of the Ontario New Home Warranties Plan Act are claims which are major structural defects.

In the definition of major structural defect in the Regulations, the defect in workmanship or materials must result in the failure of the load bearing portion of the structure or materially and adversely affect the load bearing function or the

defect in workmanship and materials materially and adversely affects the use of such building for the purpose for which it was intended. Included in major structural defects are major cracks in basement walls, but dampness not arising from failure of a load bearing portion of the building is excluded.

With respect to the cracks in the exterior garage walls, Mr. Taheem submitted photographs and the representative of the Program testified in respect to the cracks. There was general acknowledgement that there had been poor workmanship, but the area was not a load bearing area and the cracks appeared to be principally in the mortar. The representative from the Program inspected the property on July 23, 1991 and then subsequently in the first week in December 1992. He testified that there had been no change in the width of these cracks between his first and second inspection. Accordingly, the Tribunal cannot find that the cracks in the garage walls constitute a major structural defect and no compensation can be allowed to Mr. Taheem for this item.

With respect to the cracks in the basement foundation, Mr. Taheem submitted photographs showing cracks in the exterior basement, but the representative of the Program testified that these were not of a major nature and were due to normal shrinkage and expansion which is excluded under the provisions of Section 13(2)(d) of the Act. With respect to the water damage in the interior of the basement, the Program's representative testified that he could not determine whether there were cracks in the foundation wall because Mr. Taheem had finished the basement and affixed drywall to the area where the cracks were alleged to exist.

Counsel for the Program submitted that the onus was on the homeowner to prove his claim and in any event submitted that the enactment by the Legislature of Section 18 of the Regulations permitting a two-year claim for water penetration had been as a result of earlier decisions of the Tribunal which had held that where there was a material and adverse effect on the purpose for which a portion of the home was intended, there could be considered to exist a major structural defect. Counsel further suggested to the Tribunal that the time to examine the intended use had to be at the time of completion and in this dwelling, that use was simply as a basement for storage.

The Tribunal cannot concur in the submissions of counsel for the Program that the time to determine intention has to be at the time of completion. In the view of this Tribunal, many uses may be contemplated for a basement and all of these reasonable uses should be part of the purpose for which the basement was intended. Furthermore, the Tribunal does not agree that Section 18 precludes a claim in respect to major structural defect. It is the view of this Tribunal that the Legislature simply made it easier for a

homeowner to make a claim if there was any water penetration at all. If no water penetration occurred in the first two years of possession, but cracks were to open up subsequently and permit water to penetrate it is the view of this Tribunal that such a claim would not be precluded from a claim as a major structural defect. There would, however, be a much heavier onus upon the homeowner in asserting such a claim. The Tribunal, however, agrees with counsel for the Program that the onus is on the homeowner to assert a claim for a major structural defect and unfortunately in this case, Mr. Taheem has been unable to satisfy the onus upon him.

Accordingly by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program not to allow the claim of Mr. Taheem.

In the decision letter of the Program issued on July 26, 1991, the Program offered to discuss with Mr. Taheem methods of repair and approximate cost. While this was an entirely gratuitous offer and while the Tribunal agrees that there is no obligation upon the Program, it may be that the Program because of its expertise in this area is prepared to offer some advice and counsel to Mr. Taheem and the Tribunal recommends that Mr. Taheem contact Mr. Rosset, the Program's representative if he so desires. The Tribunal stresses, however, that there is absolutely no obligation upon the Program to assist Mr. Taheem and that any suggestions given by the Program to him will be entirely gratuitous and without legal recourse by Mr. Taheem against the Program.

IAN WALKER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
GERRY BEECH, Member
LOUIS A. RICE, Member

APPEARANCES:

IAN WALKER, appearing on his own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 17 February 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program denying a claim by the Applicant for certain defects in his home at 4 Fielding Court in Ajax, Ontario. The relevant facts are as follows:

This property is in a subdivision which was being built up in 1989 and, it appears from the evidence which we have being built with houses of relatively large size, good quality and substantial prices. The builder who built this house apparently built four houses altogether in this area, one of the other being at 7 Fielding Court. The property at the time appears to have been registered in the personal names of Mr. R.E. Pemberton and his wife and the Applicant understood that the building was done by a company named Pemberton Luxury Homes. In September 1989, the owners obtained from Home Savings and Loan Corporation, a second mortgage in the sum of \$250,000 and the mortgage was signed by Mr. and Mrs. Pemberton and registered on September 29, 1989.

We do not know the amount of the first mortgage, but we have an Exhibit filed being an appraisal from Home Savings & Loan Corporation from Central Ontario Appraisals dated September 28, 1989 stating that, "The property will be in a very good condition upon completion. The property is approximately 85 to 90% completed. The builder indicated the work would be done in two

weeks" and that, "The property is located in north Ajax in a desirable executive neighbourhood. The house is custom built with several upgrades." This appraisal put the value at its date as being \$790,000. The evidence also disclosed that the Pembertons subsequently put a third and fourth mortgage upon this property.

By October 5, 1990, Pembertons were in financial trouble, probably because of the downturn in the market. They were not able to pay what was coming due on their mortgages and on that date, there was a meeting at the house at which were present Mr. and Mrs. Pemberton and one of their sons, the President and General Manager of Home Savings & Loan Corporation and a representative of the Montreal Trust Company which was the first mortgagee. Two things of importance appear to have flowed from this meeting. It was agreed that the house should be sold and Home Savings & Loan Corporation which had power of sale proceedings pending proceeded with this action. The Pembertons also tried to find buyers. In the result, the agent employed by the mortgagee found the buyers, the Applicant and his wife and obtained a written Agreement of Purchase and Sale on or about October 22, 1990 with a closing date of December 10, 1990 for a price of \$550,000 - \$50,000 by way of deposit and the balance due on closing.

The second thing of importance flowing from this meeting were the observations of the Manager of the second mortgagee, Mr. Brian Moscoe, that someone was living in the house at the time he was there. He saw table and chairs in the kitchen, the usual appliances in place, dishes and evidence of food. He also saw rugs on the floor and furniture in place in the living room and in bedrooms which appeared to be used, and altogether it was clear to him that members of the Pemberton family were living in the house. He understood that Mr. and Mrs. Pemberton and some of their family were there although he only saw one son. This is corroborated by an amendment to the Agreement of Purchase and Sale signed by both parties on November 14, 1990 which included a provision, "The purchasers are to allow Mr. and Mrs. Pemberton, (the present occupants) to remain on the property until November 30, 1990." The amending agreement provided for closing on November 23, 1990 and the transaction was, in fact, closed on that date and the purchasers took possession although they did not move in until just before Christmas. Apparently the Pembertons were gone by November 23, but the Applicants had some repainting and redecorating done before they moved in.

There was at the hearing a real issue of fact between the parties as to whether the house was bought as a new house or whether it had been previously occupied within the meaning of Section 1(n) of the Ontario New Home Warranties Plan Act. In addition to the foregoing evidence of Mr. Moscoe, the Program also relied upon wording found at the top of an Agreement being Schedule "A" to the Agreement of Purchase and Sale which identified the

document as one to be used "where the property to be sold with vacant possession and occupants still on the property." The Applicant signed and was a party to this document. On this point, it was Mr. Walker's evidence that on the occasion when he was in the house looking at it to consider his offer, there were no rugs and little furniture and only a few chairs and two sleeping bags. Obviously between October 5 when Mr. Moscoe was there and October 22 or thereabouts when Mr. Walker was there, the furniture had been moved out. There was other evidence from Mr. Moscoe that for a period of time the Pembertons had made 7 Fielding Court their headquarters and were probably living there and also that he had a number of telephone conversations with them over a period of time so that he knew they had been living at 4 Fielding Court for at least three months and perhaps longer. Mr. Walker could not deny or disprove any of this evidence, but he could and did establish for us the situation at the time when he saw it. We shall deal later with our findings and conclusion drawn from all of this evidence on this point.

When the Walkers inspected the house to make their offer, it contained a considerable number of finished wooden double doors inside which were quite good looking. When they came to take possession, these doors were gone. It is a fair inference that Pemberton took them out and installed them in another house which he was building. Also the Walkers observed damage marks upon some of the finished and otherwise quite attractive wooden floors. In considering this evidence, we are somewhat puzzled. These marks would most likely have been made by moving or removing the furniture and not by the removal of the doors and apparently they were quite noticeable. They were not seen by the Walkers when they were in the house considering their Offer (while the doors were still in place but the furniture and rugs were gone).

When the Walkers discovered the doors missing and the damage to the floors, they made a claim upon the vendor mortgage company Home Savings & Loan Corporation for compensation. That company initially denied any liability and relied upon the provisions of clause 4 of the aforementioned Schedule "A" to the Offer of Purchase and Sale which reads:

4. This agreement is made without representation, warranty or condition with respect to the fitness, condition, zoning or lawful use of the property. The Purchaser will accept the property on an "as is" basis without regard for its state of repair, location of structures, walls, retaining walls or fences (freestanding or otherwise) and subject to any judicial, municipal or other governmental by-laws,

agreements, restrictions or orders affecting or regarding its condition or use (including deficiency and other notices, work and other orders), as well as any registered restrictions, agreements or covenants which run with the land.

Eventually the Company settled this claim with the Walkers by paying them \$3,000 on or about December 28, 1990. It is not clear exactly why they did this and consideration of this point is necessary to deal with one of the defences to the claims being raised here by the Program. It was established that the original builder had registered the home with the Program in the regular way. When it took over the home, the mortgagee company which sold it under power of sale did not re-enrol it as required by Section 8(4) of Ontario Regulation 726. It was the evidence of Mr. Moscoe that it did not do so because it believed the house to be occupied and, therefore, to no longer to come within the ambit of the Act as a new home being offered for sale. If, however, the Tribunal should find here that, on the facts of this case, the exception for previous occupation is not available to this vendor not only should it have been enrolled, but also the vendor cannot contract out of its warranty obligations as it purported to do in clause 4 of the Schedule "A" aforementioned. It is not clear on the evidence which we have whether the \$3,000 was paid because the vendor realized that it was probably wrong in relying upon the exception for previous occupancy and the "as is" clause as herein identified or because it conceded that "as is" meant "as is" or "as was" on the date of the signing of the Offer, at which time the double doors were in place and the marks may not have been upon the floors.

However, another very important legal step was taken at the time the \$3,000 was paid. Home Savings & Loan Corporation obtained a Final Release signed by both Mr. and Mrs. Walker which reads in part as follows:

IN CONSIDERATION of Three Thousand Dollars (\$3,000.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned, their heirs, executors, successors and assigns, do hereby release and forever discharge Home, its successors and assigns of and from all manner of actions, causes of actions, claims, liabilities, debts, covenants, contracts, accounts, duties and demands whatsoever, which the undersigned ever had or now have, or may hereafter have, for or by any reason of any cause, matter or thing,

whatsoever, howsoever, arising, in consequence of any act, transaction, occurrence or event occurring up to the date of this release which are the subject matter of, connected with, or arising out of the sale of the Property by Home to the undersigned.

We must come now to the claims which the Applicant is putting forward at this hearing. Shortly after they moved into the home, the Walkers experienced quite serious flooding of water into their basement. They hired a contractor to repair the cause of this and to do certain other work. The contractor did this work satisfactorily and there have been no leaks or difficulties in this respect since. Mr. Walker paid this contractor his price for doing this work. There is no doubt that, if the Applicant is otherwise entitled to pursue this claim, he should recover his actual and reasonable costs of these repairs from the Program. He is not barred from doing this by reason of lack of compliance with the required notice of claim provided in Section 13(4) of the Act. Included with the documents which he sent to the Program upon which its date stamp acknowledged receipt on February 27, 1991 is a copy of the Statement of Adjustment across the bottom of which he wrote "I would like to discuss a leaky foundation. Thanks." This was actual notice well within the time limit.

A second claim is with regard to the inadequacy of the well. The builder had dug (not drilled) a well on the property and it had not hit an adequate spring so that there was virtually no water in the well. It appears that the Pembertons had been having water delivered by tanker and dumped into the well so that everything appeared to be all right but of course, as soon as the Walkers moved in, the well was quickly dry. He had to pay a contractor to drill a well to get his necessary water supply. He also made this claim well within the time limited by Section 13(4).

Mr. Kevin Rector, a representative of the Program attended at the property within a day or two after the Program received the complaint about the leaking basement in February of 1991. At that time, Mr. Walker advised him of the problem with the well and he confirmed, in his evidence to us, the Program was aware of this complaint at that time. It is therefore clear with regard to this claim, the Applicant could recover the actual and reasonable cost of drilling this well if he is not barred therefrom for some other reason. While he initially made some other complaints, these two items are the only ones for which the Applicant remained seeking compensation at the end of the hearing when he better understood all of the issues.

There was a considerable amount of evidence and argument as to whether the house was finished at the time it was sold, but we shall not go into details of this here as nothing really turns on this point.

Accordingly, the Tribunal must now come to its decision upon the foregoing evidence. It is clear that the Applicant should be paid his actual and reasonable costs of repairing his foundations walls and drilling his well unless the Program is entitled to succeed with one of the defences which it has put forward. These were the following:

1. There was no vendor to come within Section 13(1) or Section 14(1)(b) of the Act because such a vendor is defined in Section 1(n) and this home had been previously occupied when sold by Homes Savings & Loan Corporation to the Walkers.

2. Alternatively the Applicant must fail because he cannot establish a claim under Section 14(1)(b) because:

(a) the house was sold "as is";

(b) even if he had a claim at one time he released it by signing the release aforementioned; and

3. Alternatively he did not prove his damages to meet the onus upon him to do so as Applicant before the Tribunal.

The Tribunal finds that, unfortunately for the Applicant, the signing of the Final Release had the effect of putting him in a position in which he had no further cause of action against the vendor and therefore he cannot make a recovery under Section 14(1)(b) of the Act. There is no need to deal further with the issues, but the Tribunal will do so in the case because it was impressed with the candour and fairness with which Mr. Walker presented his case. He said he came here to establish what his rights were and did not understand some of what had gone on and it appears only right to answer some of his questions. In the next two paragraphs, we shall comment upon some of the other issues raised which, in the result, was not essential to the decision, but were of concern to Mr. Walker

Upon the issue of whether the house had been previously occupied within the contemplation of the Act, we can say that, if this had been the only bar to his recovery we would probably have decided the case in his favour. This provision is in the Act to have the warranty coverage only apply to new homes and not to the resale of homes and the sale of homes which are not new.

Coming to the issue of the sale "as is", we would probably have held this not to be a good defence against Mr. Walker's claim. If the mortgagee had been found responsible to re-enrol under Section 8(4) of the Regulations, it would not have been allowed to contract out of its warranty obligations in this fashion.

Finally with regard to the failure to prove the actual amount of the damages, if this had been the only bar to succeed, the Tribunal might have made an Order that the Program pay the actual and reasonable costs paid by Mr. Walker to repair his basement and drill his well and that, if the parties could not agree upon the proper sums they should come back to the Tribunal to settle the amounts.

Accordingly by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicant.

RUSSELL WATSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
JACINTH HERBERT, Vice-Chairman as Member
HANS G. KEPPLER, Member,

APPEARANCES:

RUSSELL WATSON, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 18 March 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by Russell Watson from a decision of the Ontario New Home Warranty Program. The decision letter dated July 17, 1992 denies his claim for damages based on a major structural defect.

The Applicant is the third owner of the home located at 267 Alex Doner Drive, Newmarket, Ontario. The first owner took possession on July 7, 1989. The Applicant purchased the home on July 5, 1991 and took immediate possession. Upon moving in he noticed a crack long the east wall, which appeared to have been previously repaired. The crack began in the basement foundation and extended up the exterior brick to the roof. Approximately ten months later he noticed further cracking in the brick veneer. There was a hairline crack in the garage's west wall starting in the foundation and extending up seven or more courses of brick. On the south wall of the garage cracks were discovered over the centre pillar as well as the right and left side of the door. There was also a hairline crack found on the east wall which, upon excavating, the Applicant found extended to the footings. No leakage was experienced as the result of any of these exterior cracks.

Conciliation meetings took place on June 17, 1992 and June 23, 1992. The Program concluded that no major structural defect existed as a result of the inspection made on those dates.

This is outlined in the decision letter of July 17, 1992. On August 11, 1992 the Program received notice from the Applicant of this appeal.

The Applicant presented a number of photographs as evidence of his claim. The Applicant's oral testimony and corresponding photographs were his total evidence. In addition to the exterior cracks the Applicant gave evidence of cracks found in the interior of his south basement wall. Those cracks resulted in some flooding and do not correlate to the exterior cracks. The south basement wall was subsequently repaired at a cost of \$117.70. The interior cracks were never reported to the Program.

That this claim is raised outside of the one year period set out in subsection (4) of section 13 of the Ontario New Home Warranties Plan Act is not in dispute.

The Applicant argued that the sum of the cracks constitute a major structural defect which makes his dwelling unsafe. He also argued that the cracks in the veneer were symptomatic of a chemical failure which leaves the bricks in a possible position of detaching in the future.

John Dallaire testified on behalf of the Program. Mr. Dallaire is a technical representative with the Ontario New Home Warranty Program with many years of experience in the construction industry. In his brief testimony, Mr. Dallaire stated that the exterior cracks experienced by the Applicant were settlement cracks and did not constitute a major structural defect. Mr. Dallaire was unable to offer any opinion with respect to interior cracks.

Counsel for the Program Ms. Rutherford argued that the Applicant did not provide any evidence of a major structural defect. Ms. Rutherford argued that the cracks were the result of normal shrinkage due to settlement and that no chemical failure existed. Ms. Rutherford further argued that the respondent was not entitled to claim with respect to cracks to the interior south basement wall, as the claim was not brought within the two year warranty period provided for in s. 18 of Regulation 726 made pursuant to the Act. The warranty of the vendor set out in s. 18 of Regulation 726 has expired. We are of the view, however, that the expiration of that warranty does not affect the obligation of the Program under Section 14(1)(c) of the Act. That section clearly allows the Applicant to bring a claim for a major structural defect within four years after the warranty expires.

The relevant sections of the Act are Section 13(1)(b) and Section 14(1)(c):

13.(1) Every vendor of a home warrants to the owner,

-
 (b) that the home is free of major structural defects as defined by the regulations;

Section 1(o) of Regulation 726 under the Ontario New Home Warranties

(o) "major structural defect", means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
 (ii) that materially and adversely and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building...

Section 14(1)(c) of the Act provides:

14.(1) Where,

-
 (c) the owner suffers damage because of a major structural defect as defined by the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

There is no doubt that cracks exist within the foundation veneer and interior south wall of the Applicant's home. Based on the evidence produced, we are unable to make a finding that the sum of the cracks constitutes a major structural defect. There is no evidence confirming that these cracks are the result of any defect in workmanship or materials resulting in a failure of the load-bearing portion of the building or materially or adversely affecting the building's load-bearing function. Further, the evidence does not establish that the function of the walls as load-bearing portions of the building is materially or adversely affected by the presence of the cracks.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

MR. AND MRS. CHI CHUEN WONG

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GORDON R. DRYDEN, Vice-Chairman as Member
EDWARD WEISZ, Member

APPEARANCES:

MR. AND MRS. C. WONG, appearing on their own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 9 December 1992

Toronto

REASONS FOR DECISION AND ORDER

This is a claim against the Ontario New Home Warranty Program based upon substitution. The issue is with respect to the rear elevation of the home which consists of a cantilevered section running from the top of the foundation wall to the roof in which there are patio doors on the main floor and windows from the master bedroom on the second floor. The concern of the homeowners was that the whole of the area of the cantilevered section from basement foundation to roof line was of wood except for the glass patio doors and the windows in the master bedroom. The homeowners referred to a Schedule "A" to the Agreement of Purchase and Sale which provided with regard to the house exterior the following:

Exteriors are all maintenance-free clay
brick

and

All exterior wood trim (where applicable)
and windows frames are primed and painted

The homeowners submitted that the exterior of the home except around the windows should have been brick and not wood. In support of their claim, the homeowners produced photographs of a house constructed on a corner lot in the same subdivision, the rear protruding section of which was completely bricked. The evidence before the Tribunal on behalf of the homeowners was that in

purchasing this residence, they were not shown a model home, they were only shown a floor plan and they were shown an artist's rendition of a front elevation. The homeowners indicated that they bought their home from the builder under an Agreement of Purchase and Sale dated February 26, 1990 and moved in July 1990. The homeowners indicated that they objected to the rear plywood facing and were informed that it was built in accordance with the plans for this model in this subdivision. The homeowners indicated that they saw other homes in the subdivision which were constructed in exactly the same way as theirs, but that in December 1990 they found the home on a corner lot to which we have referred which was fully bricked at the rear.

Evidence was advanced that other homeowners complained as well and that the builder offered to clad the plywood exterior with aluminum siding which was accepted by a number of the homeowners, but was not accepted by Mr. and Mrs. Wong. The homeowners acknowledged that there was a cantilevered section on the front of the home in the living room area where a bay window was constructed which had wood beneath the window to the front porch. It is to be noted that this feature applied not only to the Applicants' home, but to the home on the corner lot to which reference has been made. The Applicants also indicated that they had made some reference to the plywood cladding at the time of closing and had completed a Certificate of Completion and Possession just prior to closing, but could not remember whether this particular item was noted thereon and it is to be observed that no Certificate of Completion and Possession was filed before this Tribunal.

On behalf of the builder, evidence was given that twelve models of this particular home were constructed in this subdivision in accordance with architectural plans and specifications approved by and filed with the local Building and Planning Departments. In the plans filed before the Tribunal, it clearly indicated that the rear cantilevered section was to be panelled in plywood and not brick. The homeowners acknowledged that these plans as filed with the Municipality applied to their home as well as the other eleven homes, including the one which was fully bricked at the rear.

The representative of the builder testified that the cantilevered section extending out from the basement and unsupported by foundation was a standard feature of the eleven models built in this fashion for the reason that it gave a larger floor surface area to the kitchen eating area and to the master bedroom area. The representative indicated, however, that the all-bricked house was built on a lot in December 1990 and that it required additional foundation to support the brickwork extension. The representative also indicated that the decision to build this design was made by a superintendent on the site and was done with the purpose in mind of making this particular home more attractive

for an early sale as the builder had just about completed the subdivision and wanted to sell off the balance of the houses so constructed. The representative of the builder also indicated that immediately after the completion of this house in December 1990, complaints from all of the other owners of this model came through to the builder. As a result having stirred up a hornet's nest by reason of this construction, the builder as a public relations gesture only, offered the aluminum siding which as indicated in this decision, the current homeowners were not prepared to accept.

On behalf of the Program, counsel submitted that this is not a substitution by the builder because, in fact, the plans called for a plywood exterior in this area and that a brick exterior could not have been constructed without an additional foundation for support. In examining the photographs submitted as exhibits to the Tribunal, we were able to notice that the front area under the bay window was of wooden construction and in examining the photographs of the rear section, we noted that essentially the first floor section of this panelled area was taken up almost entirely with the patio doors. Above the patio doors are the master bedroom windows and under the Agreement of Purchase and Sale, Schedule "A", both these features would be framed in wood. Accordingly only a small portion between the bedroom windows and the patio door could possibly be required to be constructed of brick. In examining the photographs, it also appears to this Tribunal that the plywood featuring between the bottom of the master bedroom windows and the top of the patio door is an area not much greater than that beneath the bay windows in the front main floor living room. For this reason, the Tribunal is of the opinion that the construction of the cantilevered section at the rear of the house with plywood is neither a defect in workmanship or material nor is it a substitution and that such does not constitute a violation of the description in Schedule "A" of the exterior being constructed of "maintenance-free clay brick".

Pursuant to the authority vested in it therefore by the Act, the Tribunal hereby directs the Program to disallow the claim of the Applicants.

UNIQUAL CONSTRUCTION INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
GERRY BEECH, Member
HANS G. KEPPLER, Member

APPEARANCES:

PAUL BELLAVIA, agent for the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 21 January 1993

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has carefully considered the evidence which has been brought before it today and we are obligated to make our decision based on that evidence. It has clearly been demonstrated to us and acknowledged by Mr. Bellavia that Frank DiBenedetto was a principal, officer and director of Oakwood Custom Built Homes Limited which is substantially indebted to the Program for breach of warranty. It has also been acknowledged before this Tribunal that legally Mr. DiBenedetto is a 50% co-owner of Sungate Construction Inc. and an officer and director of that company. It has also been acknowledged in the evidence that Mr. DiBenedetto is participating or has participated in construction of some of the homes built by Sungate Construction Inc.

The evidence of Mr. Bellavia before this Tribunal indicated that even to this time, Mr. DiBenedetto continues to do on a contract basis framing work for Sungate Construction Inc. It is the view, therefore, of this Tribunal that the circumstances set out in the original Notice of Proposal in April 1991 and continued in the Supplemental Notices of Proposal up to the Final Proposal dated September 21, 1992, have clearly been identified to Sungate Construction Inc. and that the legal circumstances set out in the Act under Section 7(2) are applicable to the registration of Sungate Construction Inc. inasmuch as Mr. Frank DiBenedetto continues to be in law an officer, director and principal of Sungate Construction Inc. No evidence has been tendered by Mr. Bellavia to indicate anything to the contrary to this Tribunal and

we are, therefore, bound to uphold the Program's Proposal to revoke the registration of Sungate Construction Inc.

There is a further matter, however, that pertains to Sungate Construction Inc. arising out of the evidence given by Mr. Bellavia before this Tribunal. Under the law pertaining to the dealing by this Tribunal with a Proposal of the Registrar, we are required to consider the circumstances up to and including the date of this hearing and the evidence that has been given to us. It is the concern of this Tribunal that in his evidence, Mr. Bellavia as an officer and director of Sungate Construction Inc. has indicated that he personally is not qualified under the provisions of Section 7 of the Act and that on the basis of his evidence, the Program could seek to revoke the registration of Sungate Construction Inc. in addition to that evidence which has been presented to us with respect to Mr. DiBenedetto.

Our findings in this regard are that although Mr. Bellavia acknowledged receipt of the original Notice of Proposal in April 1991, he has failed to comply with the Ontario New Home Warranties Plan Act, in that he has failed to remove Mr. DiBenedetto as an officer and director and principal of the company and that he has failed in any way to disassociate himself from Mr. DiBenedetto. It is our view, therefore, that he has demonstrated before this Tribunal in his evidence that there would be reasonable grounds for belief that his undertakings or the undertakings of his company would not be carried out in accordance with law. Secondly, on his evidence he has clearly indicated to us that he lacks the expertise which is required under Section 7(1)(d) and that the Program would also be justified, therefore, in revoking the licence of Sungate Construction Inc. because there has failed to be shown to us sufficient technical competence to consistently perform the warranties as stipulated in clause (d). Mr. Bellavia has indicated that his brother has such expertise, but no evidence was put forward in that regard and the fact that Sungate Construction Inc. continues to use the services of Mr. DiBenedetto would also support the fact that there is not sufficient competence by someone who is properly an officer or director of the company.

The third ground given in evidence by Mr. Bellavia, identified that DiBenedetto does still have an ownership interest in Sungate Inc. and therefore again under the provisions of Section 7(1)(c)(i), there has not been demonstrated that Sungate Construction Inc. would be financially responsible or capable of being financially responsible in the conduct of its undertakings. While it has been acknowledged by the Program's counsel that there is provision under Section 10 of the Act for a further application, it is clear to this Tribunal that the Program must consider these three areas in any application that may be made in the future by Mr. Bellavia or a company with which he is

associated. It may be that the Program will also have to consider imposing some strict terms and conditions in any such application. We leave this to the decision of the Program.

Therefore by virtue of the authority granted to us by the Ontario New Home Warranties Plan Act, we direct the Program to revoke the registration of Sungate Construction Inc.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Vice-Chairman in the presence of the other members who concurred.

RAJ P. CHOPRA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, Presiding
SELWYN CHARLES, Member
JOYCE YASINCHUK, Member

APPEARANCES:

TREVOR B. SPURR, representing the Applicant

CHRISTINA CHRISTOPHE, representing the
Registrar under the Real Estate and Business
Brokers Act

DATE OF

HEARING: 8 June 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Chopra appeals the decision of the Registrar contained in the Proposal dated January 26, 1993, to revoke his registration as a real estate broker under the Real Estate and Business Brokers Act (the "Act").

The Registrar relies upon section 6(1)(b) of the Act and takes the position that Mr. Chopra is not entitled to registration as a real estate broker because his past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with the law and with integrity and honesty.

The facts are as follows:

Mr. Chopra, registered under the Act since 1981, was convicted of fraud over \$200, contrary to the Criminal Code, on June 17, 1986.

On April 2, 1991, the Registrar by letter requested Mr. Chopra to confirm the fraud conviction, to describe the events leading to the conviction and to state why he failed to disclose the conviction on his 1987 renewal application. The Registrar also requested a copy of the Judge's Reasons for Sentencing. The Registrar requested this information within 14 days of the date of the letter.

It was accepted that Mr. Chopra telephoned the Registrar's office within the 14-day time period to request additional time to comply and that such requests are usually granted.

By letter dated October 31, 1991, Mr. Chopra replied to the Registrar's request of April 2, 1991. He confirmed the fraud conviction. He also stated that the reason for his failure to disclose the conviction on his application was his belief that a criminal record ceased to exist after 2 years. Mr. Chopra testified that the basis for this belief, acknowledged by him to be erroneous, was his reliance upon the statement of a court clerk.

In his letter of October 31, 1991, Mr. Chopra did not disclose the events leading to the conviction nor did he provide the Reasons for Sentencing. By letter dated January 20, 1992, the Registrar's office again requested the outstanding information, within ten days.

On February 5, 1992, Mr. Chopra testified that he telephoned the Registrar's office requesting additional time. In a letter dated February 24, 1992, to the Registrar's Office, Mr. Chopra states that he is enclosing a copy of the charge and the Judge's decision.

The Registrar's letter of February 25, 1992, apparently crossing the Applicant's letter of February 24th in the mail, again requested more information. Mr. Chopra was to provide a statement, in his own words, describing the events leading to the conviction, within 7 days. By letter dated March 16, 1992, Mr. Chopra described the events leading to his fraud conviction in June 1986.

The Reasons for Sentencing were eventually obtained by the Registrar's Office. In its letter of February 25, 1992, the Registrar's Office had advised Mr. Chopra that the Court Clerk's Office had telephoned its Office indicating the Reasons for Sentencing were obtainable from the Court Reporter. Mr. Chopra in his own testimony stated that he attempted to obtain the Reasons for Sentencing without success.

According to Mr. Chopra, the facts leading to the conviction were that Mr. Chopra and a debtor of his put into effect a plan whereby the car belonging to Mr. Chopra's wife was to be taken away. Mr. Chopra then made a claim against his insurance company on the basis that the car had been stolen. Subsequently, both Mr. Chopra and his wife were charged with defrauding the Wawanesa Mutual Insurance Company of \$2148.56.

May 9, 1985 was Mr. Chopra's first appearance in court, followed by several more court attendances, eventually resulting in

a plea of guilty by Mr. Chopra, with the charges dropped against his wife.

Sentencing took place on June 17, 1986, before the Honourable Judge Whealy who viewed the incident as one that was "thought out... and not a spur of the moment decision". In the judge's opinion, a suspended sentence was thus inappropriate. Mr. Chopra was fined \$1000, placed on probation for a year with conditions, which included full restitution to the insurance company, 150 hours of community service and the requirement that his probation officer grant permission before Mr. Chopra could voluntarily cease employment.

Mr. Chopra, both in his testimony and in his correspondence with the Registrar's Office, stated that he did not have the benefit of any legal advice as to the consequences of pleading guilty. Mr. Chopra further stated that he believed a different result might have been obtained, for example, a discharge, if he had legal representation.

The court records entered into evidence in this hearing suggest that Mr. Chopra was represented by counsel in the criminal proceedings. However, counsel for Mr. Chopra argued that these court records were not clear respecting whether Mr. Chopra was represented by legal counsel on all court appearances.

What is clear from these court records is that Mr. Chopra's first court appearance was May 5, 1985, followed by an appearance on September 5, 1985.

On September 17, 1985, Mr. Chopra nevertheless answered "No" to question # 7 on his renewal application, which asked: "Have you ever been convicted under any law of any country, or state or province thereof, of an offence, or are there any proceedings now pending?"

On September 11, 1987, Mr. Chopra again answered "No" to the same question #7 on his renewal application. Similarly, in September 1989, on that renewal application, Mr. Chopra denied any criminal convictions. On October 21, 1989, Mr. Chopra applied to be a Broker under the Act and, in that application, also denied any criminal convictions.

On April 8, 1993, Mr. Chopra was granted a pardon by the National Parole Board under the federal Criminal Records Act.

The Registrar takes the position that the Applicant's pardon is to be considered in the totality of the Applicant's past conduct. However, the pardon does not preclude reliance by the Registrar upon the previous fraud conviction for the Proposal.

Counsel for the Applicant agreed with the Registrar's position that the Pardon is relevant to an assessment of the Applicant's past conduct but is not legally binding upon the Registrar. He argued that some weight should be given to the pardon.

Towards this, the Registrar testified that he had considered the Applicant's pardon but nonetheless relied upon his Proposal to revoke the registration of the Applicant.

In accordance with the principles set out in the Griese decision by the Divisional Court on May 27, 1993, the issue for this Tribunal to decide is whether the cumulative effect of the Applicant's past conduct meets the requirements of section 6(1)(b) of the Act.

Within the totality of the Applicant's past conduct, the following factors are what this Tribunal considers to be of most significance:

- a) the nature of the Applicant's fraud conviction and the circumstances leading to it;
- b) his subsequent failure on 4 occasions to disclose the conviction in his applications under the Act; and
- c) his delay in responding to the Registrar's request for information about the conviction.

Firstly, the Tribunal agrees with the Registrar that the Applicant's conviction for the criminal offense of fraud - and a fraud that was hardly conceived on the spur of the moment - goes to the honesty and integrity of the Applicant, who is asking to continue working with the public in a regulated industry.

However, the conviction is now 7 years old, has been pardoned and is the only criminal conviction of the Applicant.

Standing alone, the fraud conviction may have been insufficient to support the requirements of section 6(1)(b) of the Act. Counsel for the Applicant puts the matter succinctly: the greater hurdle for the Applicant is not the 7-year-old conviction but his non-disclosure on his applications.

While the test is the cumulative effect of the Applicant's past conduct, the Tribunal agrees that the Applicant's non-disclosure in his applications to the Registrar weighs heavily in an assessment of relevant past conduct.

The Tribunal is not persuaded that there was adequate reason for this non-disclosure. In September 1985, the Applicant failed to disclose criminal proceedings against him that had taken place in a courtroom only 12 days earlier. In September 1987, well within the 2-year period during which the Applicant believed, on little basis, that criminal convictions endure, the Applicant failed to respond truthfully on his application. The Applicant agreed in testimony that he should have disclosed the conviction on these 2 occasions. The following 2 applications in September and October 1989, now outside the 2-year period, compounded the Applicant's error in judgment.

Respecting the delay in adequately informing the Registrar about the conviction, the Tribunal notes that the Applicant took almost a year to describe the events leading to the conviction. This crucial information was easily within the power of the Applicant to provide forthwith, unlike the Reasons for Sentencing, which may not have been easily obtainable.

The Tribunal has considered the testimony of the character witnesses called on behalf of the Applicant, particularly that of Mr. Loranger respecting the Applicant's financial responsibilities for a charitable organization. However, this evidence is insufficient to outweigh the totality of the Applicant's past misconduct.

In several decisions rendered by the Tribunal, the importance of full disclosure to the Registrar has been stressed. This Tribunal is of similar view, whether full and prompt disclosure to the Registrar is required to be made in application form or in response to the Registrar's request for further information under the Regulation to the Act.

Following the principles enunciated by the Divisional Court in the Brenner case in March 1983, it is clear that the Registrar requires only reasonable grounds for his decision and so long as he has them, this Tribunal must uphold the decision of the Registrar.

Accordingly, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of the Applicant.

The above decision was appealed
to the Divisional Court.
Appeal then abandoned 27 C.R.A.T. 1049

ALBERT FACCENDA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
MICHAEL E. LERANBAUM, Member (to 25 February 1992)
A. DONALD MANCHESTER, Member

APPEARANCES;

ALBERT FACCENDA, appearing on his own behalf

ALVIN TORBIN, representing the Registrar under
the Real Estate and Business Brokers Act

DATES OF HEARING: 22 February, 26 March 1991; 24, 25 February 1992;
22, 23 April; 3, 4, 30 June; 2, 3 July;
4, 6, 7, 17, 19, 20, 21, 24, 25, 27 August 1992.
Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal arising initially out of a Notice of Proposal dated October 4, 1990 (the Second Proposal) and latterly out of a Notice of Proposal dated January 29, 1992 (the Third Proposal) which affirmed and adopted the Notice of Proposal issued April 28, 1987 (the First Proposal) and the Second Proposal. In addition, in the course of the hearing further and other particulars were identified upon the evidence presented over the course of this lengthy hearing which were adopted by the Registrar as additional bases for affirming his Third Proposal to refuse registration to Albert Faccenda as a salesman under the Real Estate and Business Brokers Act.

The issue before the Tribunal in respect to the Third Proposal was that the past conduct of Albert Faccenda disentitled him to registration under the provisions of section 6 of the Act in that there were reasonable grounds for the Registrar to believe that he would not carry on business in accordance with law and with integrity and honesty.

The following items were identified as supporting this issue:

1. He failed to disclose pending charges in his original application of March 25, 1986;

2. He answered the question in regard to pending charges in the negative which was false.
3. He was convicted of the offences and sentenced to a jail term and a period of probation.
4. As a police officer when the offences occurred, he breached the trust of the community.
5. He was charged with breaches of the Police Act.
6. He is an officer and director of a corporation convicted of an offence under the Rent Regulation Act and no restitution to tenants has been made by such corporation.
7. As a salesperson under the Act, he did not act in the best interests of Charles and Martha Bendzell in the purchase of an apartment building in Hamilton.
8. He traded in real estate while unregistered.
9. He applied for a licence under the Ontario New Home Warranty Plan Act and failed to disclose the revocation of his real estate licence.
10. There were additional offences of conspiracy for which he was convicted on October 22, 1986, which he has failed to disclose.
11. He used business cards which misrepresented his capabilities and professional qualifications.

Items 1, 2 and 3 were the subject matter of the First Proposal. In addition, item 4 was added in the Second Proposal, and supplemented by items 5, 6 and 7 in the Third Proposal. Items 8, 9, 10 and 11 were introduced and developed at the hearing before the Tribunal.

The following facts were determined in the course of the hearing, either through evidence of witnesses or by Agreed Statement of Facts:

1. Albert Faccenda was a police officer with the Hamilton Wentworth Regional Police force from at least September 11, 1978 until his resignation in June of 1986.

2. Charges were laid against him on June 6, 1985 after an investigation which commenced about April 16, 1985. He was suspended with pay on June 6, 1985 but was still a member of the Hamilton Wentworth Regional Police force.
3. Charges under the Police Act were laid July 5, 1985.
4. Faccenda undertook the Real Estate and Business Broker Act courses and successfully completed these in March of 1986.
5. Faccenda applied on March 25, 1986 for registration as a real estate salesperson, answering the question on the application regarding pending charges and convictions in the negative. Faccenda was registered pursuant to this application.
6. Faccenda resigned as a policeman in the spring of 1986 subsequent to his application for registration as a real estate salesperson.
7. Faccenda pleaded guilty to Narcotics Act charges and Criminal Code charges on October 22, 1986 and was sentenced on November 27, 1986 to twelve months in jail and eighteen months additional probation. The sentence would, therefore, expire November 26, 1987 and the probation period would end May 26, 1989.
8. The Registrar issued the First Proposal to revoke Faccenda's registration on the basis of his failure to disclose that charges were pending in his application of March 25, 1986.
9. In January 1987, Faccenda was released from prison but the period of parole and probation continued.
10. The First Proposal was the subject matter of an appeal to the Commercial Registration Appeal Tribunal heard September 17, 1987 and a decision was rendered by that Tribunal on October 26, 1987 confirming the First Proposal. The decision noted that although Faccenda was granted early release, parole would continue until November 27, 1987 and probation thereafter as noted.

11. On November 25, 1987 Faccenda through his legal counsel filed an appeal of the Tribunal decision of October 26, 1987.
12. The Registrar signed a termination of registration notice on November 28, 1987 and forwarded it by mail to Faccenda.
13. On December 9, 1987 an application for a stay of the Tribunal decision of October 26, 1987 was brought before the Tribunal and on consent a stay of the decision was issued on December 11, 1987.
14. On March 21, 1988, Faccenda submitted an application for renewal of his registration as a salesperson under the Act which was granted because of the effect of the Tribunal's order staying its decision of October 26, 1987.
15. December 21, 1988 the Divisional Court dismissed Faccenda's appeal of the Tribunal decision of October 26, 1987.
16. The Registrar signed a termination notice on January 23, 1989 and mailed it to Faccenda.
17. February 23, 1989, Faccenda reapplied for registration under the Act.
18. October 4, 1990, the Registrar issued the Second Proposal asserting that there had not been any substantial change in circumstances of Mr. Faccenda sufficient to justify the application of section 10 of the Act.
19. Faccenda appealed the Second Proposal to the Commercial Registration Appeal Tribunal on October 4, 1990 which appeal was heard by this Tribunal on February 22, 1991 and March 26, 1991, on which latter date the Tribunal determined that Faccenda had satisfied the onus under section 10 of the Act to show there had been a substantial change in circumstances as of March 26, 1991, in that the parole and probation periods had both expired. The Tribunal directed the matter to proceed and to be dealt with on its merits.

20. The Third Proposal was issued by the Registrar on January 29, 1992 and the appeal before the Tribunal commenced on February 24, 1992.
21. After two further days of hearing, on April 22, 1992, because of the absence of Michael Leranbaum, on consent of counsel for the Registrar and Faccenda, the hearing continued before a panel consisting of the Vice-Chairman and Donald Manchester.
22. In all, including the time for the section 10 hearing in 1991, 21 days of hearings continued through until August 27, 1992.

In addition to the facts so determined, much further evidence was presented to the Tribunal both in support of the Registrar's decision with respect to the past conduct of Faccenda and against such decision. Before analyzing such evidence, it is important to examine the position of the Registrar as set out in his Third Proposal and as submitted by his counsel in argument to the Tribunal.

The Third Proposal of the Registrar was based upon the following Particulars.

1. The Registrar adopted and asserted his position contained in the First Proposal; namely, failure of Faccenda to disclose charges pending; answering the question concerning the same in the negative rather than refusing to answer the question at all; conviction of Faccenda on the offences; sentence imposed of 12 months in jail and 18 months further probation; and breach of the community's trust given to him as a police officer.
2. The Registrar adopted in its entirety the reasons of the Commercial Registration Appeal Tribunal issued October 26, 1987.
3. The existence of the following Police Act charges:
 - (i) Discreditable conduct.
 - (ii) Obtaining information from police facilities for private purposes and having disclosed such to one Brian Docherty who is not a police

officer (and in fact was one of the co-accused in the Criminal Code and Narcotics Act charges issued on June 6, 1985).

- (iii) While a police officer, applying for registration with the Metro Hamilton Real Estate Board and stating that he was not employed in any other occupation; failure to obtain the consent of the Chief of Police to secondary employment as a real estate agent.
- (iv) Obtaining drivers' licences in the course of his employment as a police officer and failing to turn these over to the appropriate police authorities.
- 4. Only because of Faccenda's resignation from the police force, were the charges under the Police Act not proceeded with.
- 5. Conviction under the Residential Rent Regulation Act on December 17, 1990 of a corporation, 660575 Ontario Inc. of which Lloyd Ripani and Albert Faccenda were sole directors and officers. On these charges, the Crown was seeking a fine of \$1500 for each of the three charges, but the Justice of the Peace assessed a fine of \$1,000 each on the basis of restitution being made. In fact, no restitution has been made.
- 6. The treatment by Faccenda as a real estate agent of Charles and Martha Bendzell as purchasers of an apartment building in Hamilton.

On the basis of the foregoing allegations, the Registrar concluded the past conduct of Faccenda precluded his registration as a salesman under the Act in that such conduct evidenced an indication that Faccenda would fail to act in the future in accordance with law and with integrity and honesty. The Registrar asserts that his conclusion is supported by the following:

- (i) The Tribunal decision of October 26, 1987;
- (ii) the failure to disclose pending charges at the time of the initial application in March 1986;

- (iii) the nature of the offence - trafficking in cocaine and the loathsome nature of the transaction underlying the offence;
- (iv) the outstanding Police Act charges;
- (v) Faccenda's association with a corporation convicted under the Residential Rent Regulation Act;
- (vi) the failure to act in the best interest of the Bendzells, consumers; and
- (vii) public interest.

During the course of the hearing, on the basis of evidence adduced, the Registrar submitted that there were further grounds to support his conclusion as to the unsuitability of Faccenda to be registered under the Real Estate and Business Brokers Act based on his past conduct as follows:

1. From October 26, 1987 (the date of release of the decision of the Commercial Registration Appeal Tribunal in respect to the First Proposal) until December 11, 1987, (when a stay of the decision was issued), Faccenda was actively trading in real estate in assisting the Bendzells in their purchase transactions when he was not registered, contrary to section 3 of the Act;
2. He filed an application for registration under the Ontario New Home Warranties Plan Act May 10, 1988 and failed to disclose that his licence as a real estate salesperson had been revoked by the Commercial Registration Appeal Tribunal on October 26, 1987;
3. He failed to disclose an additional offence of conspiracy for which he was convicted on October 22, 1986;
4. He submitted to the Bendzells information on the Hughson Street property which they were buying in Hamilton which information was produced by Sandra Kondo when he knew or ought to have known that Sandra Kondo was unreliable and had, in fact, obtained security for himself and for Lloyd Ripani in respect to financial dealings with her.

5. He used business cards which identified him as a financial consultant.

ANALYSIS OF THE ISSUE AND CONCLUSIONS OF THE REGISTRAR

Each of the particular items of the issue identified was subjected to considerable evidence before the Tribunal and more than 60 decisions were referred to the Tribunal in respect of cases decided not only by the Tribunal, but by the Law Society of the Province of Ontario and decisions of Ontario Courts.

1. Failure to disclose pending charges in the original application of March 25, 1986 was supported by the first particular of the Registrar's Third Proposal and the Tribunal's decision of October 26, 1987. The Tribunal's previous decision referred to the evidence of Faccenda at that time, in which he indicated that he had addressed the question of disclosure with both his lawyer and the Human Rights Commission and had been informed that he did not have to disclose the pending charges in that original application. In his reapplication in February 1989, Faccenda answered the question in the affirmative and provided particulars concerning the convictions registered against him.

2. In the original application not only did Faccenda fail to disclose pending charges, he answered the question in the negative. The Tribunal on October 26, 1987 commented adversely upon the fact that Faccenda had received advice, but chose to answer the question falsely rather than not answer the question. This is referred to in the first particular of the Registrar in the Third Proposal. In the application made by Faccenda on February 23, 1989, there was disclosure.

3. Faccenda was convicted of the offences and the period of completion of his sentence of parole and probation did not conclude until May 26, 1989. This is referred to in the first particular of the Registrar's Third Proposal. As of August 27, 1992, the last day of this hearing, the sentence imposed by the Court in November 1986 had been completed for more than three years.

4. The community's concern over breach of trust as referred to in the Third Proposal, particular #1, was not the subject matter of any direct evidence other than through the Registrar's testimony of his assessment of public perception. To some degree, this was tempered by the evidence of Mr. Di Liberto, an employer of Faccenda, with respect to Di Liberto's dealings with the Metro Hamilton Real Estate Board and with the community at large in the Hamilton area.

In particular #2 of the Third Proposal in support of the foregoing items, the Registrar adopted in its entirety the reasons of the Tribunal issued October 26, 1987. We were invited by Faccenda to consider that five years had elapsed from the Tribunal's decision at the hearing in September of 1987 to the conclusion of our hearing in August 1992.

5. The existence of the Police Act charges which are referred to in particulars #3 and #4. In reference to this matter, it is important to consider the evidence given by Staff Sgt. Robert Maxwell. Staff Sgt. Maxwell testified that the charges under the Police Act were withdrawn because Faccenda's resignation as a police officer removed jurisdiction. He also testified that all of the serious charges under the Police Act were included in the Narcotics Act and Criminal Code charges on which Faccenda was convicted. He testified with respect to each of the Police Act charges as follows:

i. With respect to discreditable conduct, this is an automatic charge whenever criminal charges are laid against a police officer.

ii. With respect to disclosing information to an unauthorized person, this charge would be at the discretion of the investigating police officer.

iii. With respect to the failure to obtain the Police Chief's consent to be a Real Estate agent, this was a very technical and minor charge.

iv. With respect to the retention of expired drivers' licences, this was an extremely minor offence, but was the sort of charge filed because Criminal Code and Narcotics Act charges had been laid.

These various charges under the Police Act, issued in July 1985 contemporaneously with the Criminal Code and Narcotics Act charges issued in June 1985, were never proceeded with because of loss of jurisdiction upon Faccenda's resignation from the Police Force in June 1986. In the view of the Tribunal these charges can have no greater weight in 1992 than those convictions which were registered in October 1986 under the Criminal Code and the Narcotics Act.

6. The Registrar in his fifth particular was much concerned that the Rent Regulation Act convictions were jointly against Ripani and the company of which Faccenda was an officer and director. Called to give evidence was David Grech, a rent review compliance officer with the Ministry of Housing. He testified that he dealt with Faccenda as agent for both Ripani and the numbered

company, and was satisfied that Faccenda was not directly involved in these issues. He stated that his investigation revealed that Ripani was the "hands on" manager of the project. He further acknowledged that the decision was currently under appeal.

Counsel for the Registrar submitted that restitution had not been made to the specific tenants. In his evidence, Faccenda testified that this was so upon advice from counsel that no restitution should be made while the appeal was pending as it might prejudice the appeal process. Filed before the Tribunal was a letter written by Mr. Grech on March 13, 1990 in respect to withdrawal of charges at that time based upon confused information provided by the local office of the Rent Review Services Branch. He also drew attention to "key money" offences, but stipulated that if furniture rental was not made a condition of obtaining the apartment, there might be a basis for increasing the rent and recommended that the parties should consult with a lawyer in respect to this matter. Subsequently charges were laid on an information sworn May 31, 1990 in respect to offences which occurred June 1, 1989 and March 1, 1990, which appears to the Tribunal to be odd given the communication from Mr. Grech of March 13, 1990. In his oral testimony before the Tribunal, Mr. Grech indicated that he had no reasonable or probable grounds for charging Faccenda. We cannot find, therefore, on the direct evidence presented to us that the conviction against the numbered company can be attributed to the conduct of Faccenda. Nor can we find that because Faccenda acted as agent for Ripani and the numbered company there can be imputed to him any condonation of the conduct of Ripani and the numbered company sufficient to affect his conduct.

7. The treatment of the Bendzells which is referred to in particular #6, together with the conduct referred to in supplemental item 4 was the subject of much evidence. We had the benefit of witnessing both Martha and Charles Bendzell in the witness box. We also were apprised of the fact that a civil law suit has been initiated by the Bendzells and it may very well be that the outcome of that lawsuit will shed further light on the facts of the dealings between Faccenda and the Bendzells. At the hearing an attempt was made to introduce evidence in regard to such lawsuit. Counsel for the Registrar quite properly objected to its introduction, on the technical basis that the lawsuit had not been brought against Faccenda, but against his former employer and that any sworn discovery evidence of the Bendzells after they had already testified in this hearing and been cross-examined was superfluous. Furthermore, being discovery evidence means that the Bendzells had not been subjected to cross-examination. As a result, this Tribunal on this issue could only make its decision based on the evidence presented, the demeanour of the witnesses and the arguments advanced.

On the evidence presented to this Tribunal, there were a number of troubling facts that were revealed in respect to the dealings with Mr. and Mrs. Bendzell. In the first instance, Mrs. Bendzell indicated that she and her husband were overwhelmed by Faccenda and that, in particular her husband was cajoled into signing documents such as Agreements of Purchase and Sale and waivers without either being informed of the contents or being aware of the contents. Mrs. Bendzell was particularly emphatic that she was furious with Mr. Bendzell's signing an offer in March of 1987. Subsequently, additional offers were signed by Mr. Bendzell in October 1987..

The evidence was clear, notwithstanding Mrs. Bendzell's protests and her concern about the pressures by Faccenda, that she continued to deal with Faccenda, frequently telephoning him in respect to various potential property purchases and with respect to refinancing of the property. It is also true that the Bendzells engaged the services of a Hamilton solicitor, Michael Rubenstein. While it was stated that it was on the recommendation of Faccenda, it was also acknowledged that Mr. Rubenstein had acted for the Bendzells previously when they had purchased property a number of years before.

The Tribunal is not at all satisfied with the quality of some of the documentation which was produced. The offers could have gone into much greater detail and, given the size and complexity of the transaction, should have been reviewed by a solicitor on behalf of the Bendzells.

We are not unmindful of the fact, however, that a solicitor was engaged by the Bendzells only after all the conditions had been waived. On the basis of the evidence, it appears that the principal consideration given by the Bendzells for this was to the costs which they would have to pay for legal advice rather than to the magnitude of the project in which they were investing. Conditions, however, had been inserted in the offers to provide some measure of protection to the Bendzells, but these were waived by Mr. Bendzell, the sole signatory to the Agreement of Purchase and Sale. While Mrs. Bendzell was present, she claimed to have been distracted by another agent while her husband signed.

The Tribunal observed Mrs. Bendzell in the witness box and while English is not her first language, the Tribunal is satisfied that she is an intelligent and strong-willed individual with a reasonable degree of business acumen. The Tribunal finds as a fact that it is not reasonable to assume that she was paying no attention to the execution of documents relating to a purchase of almost \$2,000,000, given her testimony about her dissatisfaction with her husband's executing legal documents without her involvement.

Counsel on behalf of the Registrar attempted to place considerable weight on the fact that with respect to the Rent Review processes relating to the property purchased by the Bendzells, information was provided by Faccenda to the Bendzells obtained from Sandra Kondo who subsequently became discredited in the Hamilton community and against whom Faccenda and Ripani obtained mortgage security. In our view, the evidence did not reveal that at the time that Sandra Kondo was dealing with the Bendzells, Faccenda had any knowledge of her subsequent financial improprieties.

8. The Registrar bases his first supplemental particular developed at the hearing on the technicality that from October 26, 1987 to December 11, 1987, Faccenda was unregistered and the evidence clearly indicated that he was assisting the Bendzells during that time in the course of their purchase. In support of this position, a Director's Certificate was filed which showed Faccenda unregistered between October 26 and December 11, 1987. The Tribunal is not prepared to accept this Certificate as a definitive document as the information contained therein is simply a statement of information provided by the Registrar's office. In fact, on evidence before the Tribunal, in March 1988, Faccenda's registration was renewed. This would only have been possible if there had been a continuation of his registration. There was no evidence to indicate that a fresh application for registration was made or required to be made because of the "lapse" of registration between October 1986 and December 1986. The Tribunal also notes with interest that the Registrar signed the termination notice on November 28, 1987 at which time an appeal had been launched by Faccenda's solicitor. The Tribunal finds it contrary to natural justice for the Registrar to rely upon this ground especially when the Tribunal issued an order staying its decision on December 11, 1987. In the view of this Tribunal, there is no basis for the Registrar to rely upon this ground until after the time has passed in which an appeal may be commenced and no appeal is in fact launched. This would seem to be the practice of the Registrar inasmuch as he signed his Notice on November 28, 1987 when the Tribunal decision had been rendered October 26, 1987. It is also significant to note that similarly the Registrar signed a further Termination Notice on January 23, 1989 after the Divisional Court's dismissal of the appeal on December 21, 1988.

9. The Registrar, on the basis of evidence presented to this Tribunal relied upon the failure of Faccenda to disclose the revocation of his real estate licence in his application May 10, 1988 for a licence under the Ontario New Home Warranties Plan Act. The Tribunal notes that the decision of the Tribunal was under appeal at that time and, in fact, the Registrar had renewed the licence of Faccenda in March of 1988. The Tribunal cannot find that Faccenda falsified his application to the Ontario New Home

Warranty Program.

10. In the course of the evidence and identified as supplementary item 3, it appeared that there may have been a further conspiracy charge related to the other specific Narcotics Act and Criminal Code charges which was not separately identified. In his evidence, Faccenda indicated that he thought reference had been made to the fact of charges and convictions and that this was included in the totality of the convictions. All of the charges related to facets of a single transaction. The Tribunal takes judicial notice of the fact that it is very common to lay variations of charges in criminal matters such as a number of included offences and in the view of this Tribunal, this is a very legalistic and narrow ground for the Registrar to rely upon. We are not satisfied that it is appropriate.

11. In Supplemental Particular #5 reference is made to the business cards used by Faccenda. A business card of Faccenda was introduced which described him as being a "real estate sales representative and investment consultant". Evidence was submitted to the Tribunal indicating that the Registrar had grave concerns about this type of designation and reference was directed to the manuals used in the teaching of the Real Estate and Business Brokers Act courses. While the Tribunal concurs in the concern of the Registrar over the nature of the wording, in the absence of direct notice to the profession either from the Registrar's office or contained in the Regulations under the Act, the Tribunal has difficulty in finding that this reflects adversely upon the conduct of Faccenda.

Concerning the Registrar's regard for the public interest, one of the issues which has to be reviewed and determined by the Tribunal is the length of time from the completion of sentence as it pertains to Faccenda and his conduct in the community until the present.

DETERMINATION OF THE TRIBUNAL

Arising from the analysis of the conclusions of the Registrar relative to the issue of past conduct of Faccenda, the Tribunal makes the following findings of fact.

Referring to conclusions 1 and 2, the Tribunal notes that there was deception of the Registrar in fact even if not intended in the original application by Faccenda of March 25, 1986. As a result, a Tribunal quite properly on October 26, 1987 held in favour of the Registrar. No such deception occurred in the application filed by Faccenda under date of February 23, 1989 which is the application under review by this current Tribunal. Arguably, it may be suggested that the Registrar was fully aware of

the matters by this time and no useful purpose would be served by further deception on Faccenda's part. The Tribunal finds, however, that it is inappropriate for the Registrar in his Third Proposal to relate back to the content and error which initiated his First Proposal. This Tribunal following the direction of the Divisional Court in the Brenner case¹, finds that it is inappropriate to revive an error of three years previous. To do so would mean that reformation could never be accomplished. This Tribunal does not agree with the proposition submitted in argument that the Third Proposal is entitled to include actions contained in the First Proposal. It is appropriate to identify the circumstances which led to the First Proposal and the ultimate decision of the Tribunal on October 26, 1987, but it is the view of this Tribunal that actions subsequent thereto are of substantial importance to determine whether reformation has occurred. We are not unmindful of the fact that in the Brenner decision, the Divisional Court indicated that a course of conduct over a period as short as one year might give rise to a different decision of the Registrar or the Tribunal. In this case, we have a period of three years at which time, Faccenda has responded to the question in the application in detail.

Regarding conclusions 3 and 4, the Tribunal finds that it must consider whether Faccenda has paid his debt to society in the completion of his sentence and whether his actions as a police officer, reprehensible as they may have been at the time, continue to apply to the community's assessment of Faccenda.

The Tribunal finds that the sentence has been concluded by Faccenda and that there has been no further criminal activity since 1985, and that accordingly the community's concern would have been dissipated over the past seven years unless the decisions of this Tribunal and other Tribunals and the Courts of Ontario would compel us to conclude otherwise.

With respect to conclusion 5 dealing with charges under the Police Act, the Tribunal finds as a fact that whether these would have been proceeded with in whole or in part and whether there would have been a conviction against Faccenda in respect to one or more of these charges, these charges no longer exist because of the failure of the Police Department to proceed with these charges through a loss of jurisdiction upon the resignation of Faccenda in June 1986. It is appropriate for the Tribunal to note the fact that charges under the Police Act were laid against Faccenda in 1986, but as there is no outcome, the Tribunal has to consider these charges as not having existed for six years. To the extent that any of the charges may have relevance to the convictions registered against Faccenda in the Provincial Court, the same considerations must apply to these as would apply to the Criminal Code and Narcotics Act convictions; namely, there has been

no reoccurrence in the three-year period since completion of sentence.

With respect to the sixth conclusion dealing with the Rent Regulation Act convictions against the numbered company of which Faccenda was an officer and director, the Tribunal finds as a fact the evidence of Mr. Grech, the Rent Review Compliance officer of the Ministry of Housing, compelling in that he found no basis for laying charges against Faccenda. In considering that Ripani who was also an officer and director of the company and the directing mind on a day to day basis as manager of the project was personally convicted under the Rent Regulation Act and that therefore the numbered company could be convicted vicariously as a result, the Tribunal finds that no weight to the conviction of the company in the absence of any direct evidence showing the involvement of Faccenda, can be attributed to Faccenda's conduct.

The most troublesome particular to this Tribunal is the treatment of consumers such as the Bendzells by Faccenda in his capacity as a real estate agent. The Tribunal finds as a fact that the continuing conduct of the Bendzells to deal with Faccenda during 1987 is counter to the irate testimony of them before this Tribunal in 1992. As noted, the documentation in respect to the purchase of the Hughson Street property in retrospect could be much improved. The Tribunal is concerned, however, that there is a substantial responsibility upon a purchaser when entering into the purchase of a mixed commercial and residential apartment property for a price of \$1,950,000 to engage the services of an experienced solicitor to cover all of the contractual details and to assist such purchaser in determining what additional professional assistance by way of accountants, engineers and others might be appropriate in making such an investment. The Tribunal is also concerned that a solicitor should be involved in any waivers of conditions which are of a substantial nature. It is the view of this Tribunal that the documentation in this transaction should have been the responsibility of a solicitor rather than a real estate agent and that the Bendzells in making an investment of this magnitude had a responsibility to themselves to engage the services of a solicitor at the time of preparation of an offer and in any event before waiving any of its terms and conditions.

In our view, the Bendzells would appear to be major contributors to any misfortune which may have occurred. This is not to say that the Tribunal finds the actions of Faccenda blameless. A prudent real estate agent should assume a responsibility of directing a prospective purchaser to obtain legal and other professional advice sufficient to make a sound business judgement. On the other hand, the calm analysis in a Tribunal setting after the event is not always evident in the throes of the immediacy of an investment in a rising market.

The Tribunal is not satisfied that the facts are sufficient to satisfy it that Faccenda's conduct was so reprehensible that he should be denied the right to registration as contemplated under section 6 of the Act. It has been noted that there is a civil law suit in process in which the Bendzells are plaintiffs and the former employer of Faccenda is one of the defendants together with Michael Rubenstein, the former solicitor for the Bendzells. It is entirely possible that facts will be elicited in that lawsuit which may shed further light upon the conduct of Faccenda as a real estate agent which might entitle the Registrar to issue a further Proposal, but on the evidence before this Tribunal the facts determined thus far do not compellingly persuade this Tribunal that the past conduct of Faccenda disentitles him to registration.

The first Supplemental Particular raised in evidence by the Registrar regarding the trading by Faccenda while not registered is on the basis of the evidence before this Tribunal unsubstantiated. The Tribunal finds that so long as there is an appeal possible, a registrant cannot be subjected to a Proposal or a charge under this section of the Act notwithstanding the provisions of section 9(9) of the Act. This would appear also to be confirmed by the practice of the Registrar's office in not sending out a Notice of Termination until after the expiry of the time in which an appeal can be commenced. The Tribunal finds as a fact that this practice of the Registrar is consistent with fairness and should be continued.

Concerning the second supplemental particular, the Tribunal finds that Faccenda did not falsely complete his application under the New Home Warranties Plan Act because, given the order of the Tribunal staying its decision and the renewal of his registration as a salesperson by the Registrar in March 1988 until a decision of the Divisional Court was given, his real estate licence was not cancelled and was still in effect.

With respect to supplemental item 3, the Tribunal is of the view that Faccenda did make sufficient disclosure of the charges and convictions against him in his 1989 application.

The evidence before the Tribunal with respect to the business cards is not entirely satisfactory. The Registrar acknowledged that this is an issue which has been much discussed within the real estate industry. In the absence of any clear direction promulgated by the Registrar and the absence of specifics in the Regulations, the Tribunal is loth to find Faccenda's conduct in respect to this item sufficient to disentitle him to registration. It is also to be noted that the business cards in question were in use in 1987 and no evidence was put before the Tribunal to indicate that such business cards were used

subsequently.

FINDINGS OF FACT OF THE TRIBUNAL CONSIDERED
IN RELATION TO THE LAW CITED TO THE TRIBUNAL

1. Failure to disclose charges and deception by answering falsely.

While the Tribunal is of the view that in the first application Faccenda in fact failed to disclose and responded falsely, in his subsequent application he has responded correctly even if, according to the view of counsel for the Registrar, incompletely. Are these circumstances sufficient to support the Registrar's action in refusing registration? The Tribunal was referred to the second Lloyd Ripani² case, under the Real Estate and Business Brokers Act. In that case, Ripani in his first application for registration responded to the question regarding charges and convictions in the negative. Subsequently that registration lapsed, perhaps in view of the fact that he was jointly charged with Faccenda and subsequently convicted and incarcerated.

Later he made application for registration under the Real Estate and Business Brokers Act and fully disclosed the convictions. The Tribunal in granting him registration placed no reliance on the negative answer given in his original application and instead looked upon his more recent past conduct. Counsel for the Registrar referred us also to the case of Michael Beauregard³. The reasons in that case are quite short and seem to be based simply upon an application filed in June 1986 for registration and a decision of the Tribunal in October 1987 finding that there had been an answer to the question of convictions in the negative. There was no indication in the reasons that there was any subsequent conduct which would either support or discredit Beauregard in spite of the Brenner decision and the Tribunal, therefore, finds this decision unhelpful to the issue in these proceedings.

Another circumstance was considered by this Tribunal in the two Cynthia Hayes' cases. In the first⁴, Ms. Hayes answered 'No' to the question with respect to convictions when in fact there were convictions. She testified that she did so in the erroneous belief that there was an automatic pardon provision. In that case, the Tribunal upheld the decision of the Registrar not to grant her registration. In the second case⁵, after receiving a pardon, Ms. Hayes again applied. The Registrar took the position that there had been previous non-disclosure and that as he had information in her file, it did not matter that a pardon had been granted. The Tribunal in the second Hayes case was of the view that the Registrar could not continue to rely on the first application and

overruled the decision of the Registrar. This is consistent with the Brenner decision and in our view supports the finding of this Tribunal with respect to the subsequent application of Faccenda.

With respect to partial disclosure and in this regard we are considering the submission of the Registrar's counsel that not all charges were fully revealed, although the Tribunal finds that as a fact substantially full disclosure was made in the second application, a number of cases have been cited to us in which registration has not been granted because of incomplete disclosure. Several of these are the Bradt⁶ case in which the Applicant indicated a minor narcotics conviction, but failed to reveal a major dangerous driving charge when he was under the influence of narcotics; the Gilroy case⁷ in which the Applicant disclosed only a motor vehicle conviction for driving with a high blood alcohol level, but failed to disclose narcotics charges and other driving offences - all of very recent vintage preceding the date of his application; similarly in the Barroso⁸ case in which the Applicant admitted a charge and conviction of possession of a narcotic, but failed to disclose further convictions including sentences of imprisonment.

Conversely, there have been decisions in which although only partial disclosure has occurred registration has been permitted. Among the many decisions cited to this Tribunal, reference should be made to a few such as the following: the Nimmo case⁹ - in this case at page 327 the Tribunal stated as follows:

It is to be noted that Mr. Nimmo disclosed the most serious of the charges against him...but failed to make disclosure of prior convictions as required by the application form.

After a very thorough consideration of cases previously decided by the Tribunal, Mr. Nimmo was granted registration on terms and conditions. In the Manuel case¹⁰ there was partial disclosure only, yet the Tribunal directed the Applicant to be registered on the basis of examining his past conduct. In the Stogdill case¹¹, the majority decision of the Tribunal permitted Stogdill to be registered on terms and conditions notwithstanding a serious non-disclosure of convictions under the Business Practices Act; in the dissenting decision, concern was expressed with the non-disclosure but much of the decision was based upon the improper practices used by Stogdill in consignment sales.

The Tribunal makes a distinction between the application filed March 25, 1986 which has been thoroughly reviewed by the Commercial Registration Appeal Tribunal and the decision of which has been upheld by the Divisional Court, from that of the second application submitted February 23, 1989 almost three years later.

The latter is the application which is now being considered by the Tribunal and in that application, there has been in the view of this Tribunal substantially full disclosure notwithstanding the evidence on the hearing that a specific conspiracy charge had not been identified. Therefore on the basis of the previous decisions of this Tribunal, the Tribunal is satisfied that in respect to this item, the Registrar erred in finding that Faccenda's past conduct disentitled him to registration.

2. The fact of there having been a criminal conviction in respect to narcotics offences and a sentence imposed which resulted in parole and a probationary period.

These issues have been reviewed in considerable detail from time to time by this Tribunal. Consideration has been given to the nature of the offence and the penalty imposed, and Tribunal panels have assessed whether the circumstances are such that either the individual should not be permitted to be registered or be registered only after a period of time. In particular, the Tribunal has in many cases reached the conclusion that so long as an individual is under the supervision of the courts either during parole or a probationary period, such person has not personally demonstrated a period of past conduct sufficient to permit the Applicant to be registered.

Examples where the Tribunal has held that an Applicant should not be registered are the Williamson case¹² in which Williamson was involved with a company known as Argosy Financial Group of Canada in which thousands of investors were defrauded of more than \$24,000,000, and Williamson pleaded guilty to nine counts of fraud and was sentenced to a substantial prison incarceration. Another case along the same lines is that of Kenneth Chartrand¹³ in which Chartrand was involved in a major narcotics trafficking scheme in which he was the ringleader, had 30 people working for him, testified that it was only a business, but failed to declare the substantial income which he made to Revenue Canada and on conviction was sentenced to seven years in jail. The Tribunal in that case noted in particular that Chartrand indicated no remorse whatsoever.

Notwithstanding the policy enunciated above, there has been a growing tendency in Canada to permit reinstatement of individuals whether they be real estate salespersons or lawyers or other professionals after a reasonable period of demonstrated rehabilitation. While it is still the policy of this Tribunal not to permit a registration while an Applicant is under parole or probation except in the most unusual circumstances, following completion of an Applicant's sentence in full, registration has been permitted in a number of cases. Examples of this policy are represented by a number of cases cited to the Tribunal, a few of

which are as follows. In the Doherty case¹⁴, the Tribunal noted that Mr. Doherty could reapply for registration in several months after the hearing at which time his probation would have been concluded; in the case of Donald Miles¹⁵ which involved convictions for sexual assault and circumstances relating to another physical assault, notwithstanding these circumstances the Tribunal expressly provided that when Miles had completed his probation he was entitled to apply under section 10 of the Act; another case is the first Ripani¹⁶ case in which the Tribunal noted that Mr. Ripani's parole would not expire until later in the year and approved the policy of the Registrar not to register Applicants while on parole; while the first Ripani case was under the Motor Vehicle Dealers Act, the second Ripani² case was under the Real Estate and Business Brokers Act and the Tribunal commented favourably upon the fact that Ripani's parole and probation had been terminated prior to the application being brought before the Tribunal. In the Tessier case¹⁷, the Tribunal specifically directed the Registrar to register the Applicant subsequent to the completion of his parole provided the Registrar has no fresh evidence of misconduct. In addition to other considerations, it should also be noted that in the first Faccenda case¹⁸, the Tribunal stated that among other factors Mr. Faccenda was still on parole and would be on probation for a further eighteen months at the time of the hearing.

3. Breach of Trust by Faccenda as a police officer and charges under the Police Act

While it is noted that these are extremely serious matters, it is also to be noted that convictions against police officers have not in all circumstances prohibited an applicant from being registered as a real estate salesperson. Attention is drawn to the circumstances of the second Ripani² case and the Michael Sills case¹⁹ in which Sills had been convicted of perjury while he was a police officer and was also convicted under the Police Act, yet the Tribunal determined that he was entitled to be registered as a real estate salesperson on the basis of his general past conduct. In addition, a number of decisions of the Law Society of Upper Canada were brought to the attention of the Tribunal which indicated that the Law Society had permitted re-registration of solicitors after a period of rehabilitation notwithstanding breach of trust as a solicitor. One example is the Goldman case²⁰ in which the solicitor had been convicted of conspiring to possess counterfeit money and been sentenced to fifteen months imprisonment in 1981. As a result, the solicitor was disbarred but was readmitted in 1987. Another interesting case is that of Ruby Richman²¹ in which the disbarred solicitor subsequently was permitted to be registered as a real estate salesperson by the Commercial Registration Appeal Tribunal²² provided that he made restitution of the substantial sums which he had taken as a lawyer from his clients.

4. Conviction of a Company under the Rent Regulation Act in which company Faccenda is both an officer, director and principal shareholder

An important decision in this regard is the Coates case²³ in which a company controlled by the Applicant under the Motor Vehicle Dealers Act was convicted upon a plea of guilty of two counts of fraud in respect to tampering with vehicle odometers. On the basis of that conviction, the Commercial Registration Appeal Tribunal directed the Registrar to carry out his Proposal to revoke the licence of the Applicant Coates based upon the fact that the conviction of the company raised a presumption that the individual appellant was personally involved. The Divisional Court upheld the Coates' appeal. The headnote states "clear and convincing proof based on cogent evidence that the individual appellant was involved would be necessary to support the cancellation of his licence." In the evidence before the Tribunal of Mr. Grech the rent review officer, there was clearly no direct linkage made between Faccenda and the company, in contrast to the linkage between Ripani and the company on the basis of which charges were laid both against Ripani and the company.

5. The decision of the Registrar should not lightly be overturned

This is firmly established by the Brenner case¹, but a number of cases over the years have indicated that where the Tribunal is of the view that there was an error by the Registrar, it is appropriate for the Tribunal to substitute its decision for that of the Registrar and in the unique circumstances of this case, it is the view of this Tribunal that such should occur.

6. A matter of concern in respect to delay also was raised in submissions before the Tribunal.

This delay in question is the lack of action by the Registrar in respect to the application filed by Mr. Faccenda on February 23, 1989. Not until October 4, 1990 was a Proposal issued by the Registrar, a delay of almost 20 months. Since the enactment of the Canadian Charter of Rights and in particular the decision of the Supreme Court of Canada in the Askov case²⁴, issues of delay have been considered at length by various courts in Canada. While the Askov case dealt with criminal matters, nevertheless, the principles, particularly when they apply to the licencing of an individual to conduct his business operations, must be given careful examination. The Tribunal is not unmindful of the fact that many matters come before a Registrar in the course of his duties and it is not always possible to proceed in a speedy manner. Nevertheless in this instance, given the fact that Faccenda and his file were well known to the Registrar, it is the view of the

Tribunal that there was a duty upon the Registrar to proceed with some promptness in issuing a Proposal not to register. In his testimony before the Tribunal, the Registrar indicated that when he considered the application of Faccenda, coming so closely after the decision of the Divisional Court in dismissing the appeal of the first Faccenda case, his view was that there had not been sufficient change in circumstances to grant registration. In the view of this Tribunal, it was incumbent upon the Registrar therefore promptly to issue a notification to that effect and to issue a Proposal. A delay of 20 months constitutes, in the opinion of this Tribunal, a denial of natural justice to the Applicant.

Pursuant to the authority vested in it under the Act therefore, the Tribunal hereby directs the Registrar not to carry out his Proposal and to register the Applicant Albert Faccenda as a salesperson under the Real Estate and Business Brokers Act.

The above decision was appealed to Divisional Court. Its decision is reported at 27 C.R.A.T. 1050.

FOOTNOTES

- 1 re Richard G. Brenner (1983) 19 CRAT 58
- 2 re Lloyd Ripani (1989) 18 CRAT 356
- 3 re Michael Beauregard (1987) 16 CRAT 197
- 4 re Cynthia Hayes (1988) 17 CRAT 231
- 5 re Cynthia Hayes (1990) 20 CRAT 477
- 6 re Orval D. Bradt (1987) 16 CRAT 202
- 7 re Allan M. Gilroy (1989) 18 CRAT 285
- 8 re John E. Barroso (1990) 20 CRAT 422
- 9 re Robert B. Nimmo (1989) 18 CRAT 324
- 10 re Joseph Manuel (1990) 20 CRAT 517
- 11 re James Stogdill (1990) 20 CRAT 66
- 12 re Gary Brian Williamson (1987) 16 CRAT 266
- 13 re Kenneth Chartrand (1988) 17 CRAT 199
- 14 re Patrick Doherty (1989) 18 CRAT 268
- 15 re Donald Miles (1991) 21 CRAT 282
- 16 re 676690 Ontario Inc. (Metropolitan Leasing & Rentals)
and Lloyd Ripani (1987) 16 CRAT 121
- 17 re Daniel Tessier (1987) 16 CRAT 261
- 18 re Albert Faccenda (1987) 16 CRAT 220
- 19 re M. Sills (1990) 20 CRAT 531
- 20 re Gordon Goldman (Law Society Discipline Cases
1972 - 81) page 208
- 21 re Reuben Ruby Richman (Law Society Discipline Cases
1972 - 81) page 462
- 22 re Ruby Richman (1986) 15 CRAT 212
- 23 re Coates et al & Registrar of Motor Vehicle Dealers (1988)
65 O.R. (2nd) 526
- 24 re R v. Askov (1990) 75 O.R. (2nd) 673
(Supreme Court of Canada)

RICHARD ANTHONY FISHER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
GARY ZALEPA, Member

APPEARANCES;
RICHARD ANTHONY FISHER, appearing on his own behalf
LAURIE DAVIDSON, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 20 August 1992 Toronto

REASONS FOR DECISION AND ORDER

At the conclusion of this hearing, the appellant Richard Anthony Fisher who gave no evidence, in his submissions admitted the facts as they were adduced in evidence and in the Proposal. We may, therefore, reproduce them in part as they appear in the Proposal.

2. On February 2, 1990, the Registrant consented to abide by additional terms and conditions of registration under the Act. A copy of the Consent including specific Terms and Conditions are attached as Schedule "A".
3. The Consent was acknowledged by both Richard Fisher and his new sponsoring broker, Trillion, on August 23, 1990.
4. The reasons for the Terms and Conditions were that the Registrant had two criminal convictions: one for possession of narcotics in February 1982; and one for possession for the purpose of trafficking in May, 1977. Further, the Registrant disclosed in an application for registration dated July 13, 1989 pending charges of possession under the Narcotics Control Act.

5. In fact, in an application dated August 22, 1979 the Applicant had disclosed a conviction for simple possession of marijuana under the Narcotics Control Act stating - "conditional discharge". This information was false as the Applicant was convicted in 1977 for possession for the purpose of trafficking and fine \$750.
6. And in fact, in an application dated June 13, 1983, the Applicant did not disclose his conviction of February 5, 1982 of possession for which he was sentenced to a period of incarceration for 14 days.
7. As specified in the Terms and Conditions, the Registrant, by letter dated November 23, 1990, did inform the Registrar that he had received a sentence of incarceration for three and one half years pertaining to the pending charges referred to in paragraph four above. A copy of the letter is attached hereto as Schedule "B".
8. The conviction rendered against the Registrant in November 1989 was not, however, for simple possession as disclosed in the application dated July 13, 1989, but rather for trafficking in narcotics.

The Applicant has, therefore, given false information to the Registrar in applications dated August 1979, June 1983 and July 1989.

Moreover, the Applicant is currently serving a period of incarceration which will not be completed until 1993.

The only issue before us then is whether this man's registration should be revoked on the evidence which has not been denied. It is clear that Mr. Fisher failed to disclose certain relevant information to the Registrar in his application of August 22, 1979, June 13, 1983 and July 1989. This information was confined only to his criminal charges and convictions. There is no evidence of any complaints against him in the conduct of his business or of any charges relating to fraud or dishonesty involving his clients. His difficulties appear to have arisen entirely from his use and abuse of drugs. He seems now, however, to have responded favourably to treatment as indicated by a letter from Dr. Lana Stermac, a psychologist who had been assigned to assess his progress.

The letter reads as follows:

To Whom It May Concern

Mr. Tony Fisher was referred to me in late 1991 and again in March of 1992 as part of his parole conditions for assessment and possible treatment of substance abuse. I indicated at that time that Mr. Fisher displayed both motivation and responsibility towards his problems and fully complied with all of the terms of his conditions. At the time of our meetings, Mr. Fisher had already made significant progress in dealing with his previous substance abuse and continued to progress over the time that I saw him. To the best of my knowledge, Mr. Fisher has not had any further difficulties with drug use and has remained substance free.

This letter was signed by Dr. Lana Stermac and dated August 18, 1992.

There is no evidence before us to refute the findings of the doctor and we accept it without reservation. Two years have elapsed since the Hon. Mr. Justice Hayes delivered the following reasons for sentence after the convictions of Mr. Fisher on both the charges of possession and of the trafficking in narcotics.

The Justice points out:

In this matter the accused stands convicted of an offence of possession of a narcotic for the purpose of trafficking on the 2nd of December, and a further conviction on that date...

The court must observe that it is apparent that on that occasion in December the accused before the court was in possession of a very substantial quantity of a narcotic clearly for the purpose of trafficking. Then, subsequently, he is released on bail and on the 7th day of February he is convicted for an offence on that date of possession for the purpose of trafficking and a further offence on the 7th of November for possession for the purpose of trafficking, again,

marijuana...

It is of substantial significance that this man, after having been arrested in respect of the matters in December of which he now stands convicted, has such little disregard for his bondsman, for his family or himself, and lastly for the laws of this community that he then carries on with the same activity on the 2nd of February. It indicates an attitude which does not commend itself toward him having at that time, in any event, any particular tendencies to regard the law or to indicate that that conflict with the law in December might reasonably lead hopefully to some rehabilitative path.

This is an accused person in which I have had the benefit of a pre-sentence report. He has a university degree. He has a supportive family. He has the knowledge and ability to understand the circumstances in which he placed himself, and the disregard and the nature of the disregard that he had for his responsibilities before the law. I have read the pre-sentence report and it notes that his employment history indicates that he is an enthusiastic person in his trade of that of a salesman, and his employment people are satisfied with his performance.

The Justice then sentenced Mr. Fisher to a period of two years in penitentiary together with an additional eighteen months. Since his release, there appears to have been an honest and determined effort on the part of Mr. Fisher to turn his life in another direction and there is some evidence of rehabilitation.

This Tribunal, however, must consider the law as it has been presented by counsel for the Registrar and the number of cases which have been decided on facts not dissimilar to those before us.

Throughout the fabric of each of these cases runs a thread of caution weaving support for the Registrar in his refusal to register an Applicant while he is still on parole. Mr. Fisher will be on parole until the month of April 1994.

We are, therefore, of the view that the facts as presented to us do not permit any deviation from that course. The

facts are not in dispute and the law well and unequivocally established. The Registrar is therefore directed to carry out his Proposal.

BRIAN GARNER and ERIKA NEESER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chair, Presiding
TIBOR PHILIP GREGOR, Member
A. DONALD MANCHESTER, Member

APPEARANCES:
STANLEY J. WEISMAN, representing E. Neeser

PATRICK SCHINDLER, representing B. Garner

GEORGE W. GLASS, representing the
Registrar under the Real Estate and Business
Brokers Act

DATES OF HEARING: 29 October 1991; 16, 17, 19 November 1992;
7, 8 April 1993 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing to consider the Registrar's Proposal to suspend the registration of two real estate salespersons, Brian Garner and Erica Neeser, on the grounds that their past conduct affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty. The Proposal to suspend is made pursuant to Sections 6(b) and 8(2) of the Real Estate and Business Brokers Act. Mr. Garner has been a registered agent since 1984 and Ms. Neeser has been registered since 1982.

The facts underlying the Registrar's Proposal all stem from a single transaction which occurred in 1987. At the time both agents were in the employ of the same broker, namely, Remax Realty Lifestyles Inc. Mr. Garner was the listing agent for a property located at 14 Queen Street South in Streetsville. This property was the home of, and was owned by Ms. Leona Wysminity. Mr. Garner had previously represented Ms. Wysminity when she had purchased the property in 1985. The listing price was \$269,000. The listing expired on September 30, 1987.

On September 29, 1987, while she was the duty agent at the Remax office, Ms. Neeser received a telephone call from a prospective purchaser, Mr. Jenkinson. He was looking for a property that would be suitable for offices. Ms. Neeser had never dealt with

Mr. Jenkinson before. Ms. Neeser reviewed a number of possible properties with Mr. Jenkinson, and he became interested in the Wysminity property. Ms. Neeser showed him the property twice and she also attended personally at the municipal offices to check on the zoning. The property was zoned "TR4" designating a transitional residential zoning. The significance of the "TR4" zoning will be discussed in more detail later in these reasons.

On or about October 7, 1987, Mr. Jenkinson told her that he had drawn up an offer on the property and that he wanted her to present it to the vendor. She advised Mr. Garner who arranged an appointment with the vendor. The two agents met with Ms. Wysminity at her home on the evening of October 8, 1987, at which time Ms. Neeser presented the offer which was made by "Michael C. Jenkinson in Trust". In a nutshell, it is the Registrar's position that these two agents failed to adequately advise the vendor as to the Jenkinson offer and its terms and as to all of its potential pitfalls before Ms. Wysminity accepted the offer, thereby breaching the fiduciary duty which they owed to the vendor and demonstrating a lack of honesty and integrity in their dealings with her. This past conduct, it is argued, affords reasonable grounds for belief that these agents will not carry on their future business dealings with honesty and integrity.

Before examining some of the individual provisions of the Jenkinson offer which could be characterized as not being in Ms. Wysminity's best interests, it is revealing to step back and look at the offer as a whole and in the context of the real estate market as it was in the fall of 1987. As stated in the evidence of Mr. Gordon Randall, Registrar, this was a period of rapidly rising prices and a fair amount of speculation was going on. Mr. Garner testified that the offer was made in the context of a rising market which attracted investors and speculators. Ms. Wysminity was clearly inexperienced and unsophisticated insofar as real estate transactions were concerned, her only prior experience being the purchase of her home and a subsequent partial refinancing thereof, and she relied entirely on the two agents, and Mr. Garner particularly, to assess and advise her as to the Jenkinson offer as well as to explain its component terms.

The Jenkinson offer provided for a purchase price of \$255,000.00. The total deposit/down payment offered was \$15,000.00, representing about seven (7%) percent of the price. The balance of the purchase price was to be payable pursuant to first and second vendor take back mortgages. As discussed below, the transaction was premised upon the vendor selling the first mortgage at a discount. The person or entity that would actually be taking title to the property and who would therefore be giving back the mortgage was totally unknown as Jenkinson had submitted the offer "in trust" without providing the identity of the ultimate purchaser. In

summary, there would be very little equity invested by Jenkinson and/or the ultimate and unknown purchaser. The deposit was just enough to cover the real estate commission. The "trust" would have made it very easy for Jenkinson to "flip" the property at a profit if that was his intention, or to walk away from the deal risking only the deposit, and leaving behind an impecunious shell company or individual as the purchaser. Mr. Garner clearly recognized that this was an "investor speculator type offer" with a "low down payment and high leverage". Ms. Neeser understood that this was not a "regular type of offer" and asked Mr. Jenkinson to give her a regular type of offer, to which he apparently replied "No, that would make me a regular type of guy." Mr. Garner recognized that Ms. Wysminity and Mr. Jenkinson were "on the opposite ends of a rod" as far as their sophistication and knowledge about real estate transactions was concerned. Yet there was no evidence before us to indicate that either of these two agents warned Ms. Wysminity that Mr. Jenkinson was probably an investor or speculator. They failed to adequately explain to Ms. Wysminity the dangers and disadvantages of accepting an offer from a purchaser who was investing very little equity in the property, nor were the potential pitfalls of selling to an "in trust" purchaser raised with her.

One aspect of the Jenkinson offer that consumed a major part of the hearing was the open vendor take back first mortgage in the sum of \$191,250.00 bearing interest at the rate of ten (10%) percent per annum for a three year term. The principal amount of this open mortgage exceeded seventy-five (75%) per cent of the purchase price. The interest rate was at least one and a half if not two or more percent, less than current first mortgage rates at the time. Moreover, as stated above, the identity of the eventual mortgagor was unknown, and accordingly the mortgagor's creditworthiness was incapable of assessment. The Jenkinson offer was conditional upon the purchaser being able to sell this mortgage. The relevant provision of the contract read:

The offer is conditional upon the vendor or his agent being able to sell the aforementioned first mortgage within ten days from the acceptance of this offer. Otherwise, this offer becomes null and void, and the purchaser's deposit shall be returned to him in full without interest.

Before delving into the details of the evidence in respect to the discount on the mortgage, it must be noted the two agents either must have known or ought to have known that it would be difficult to sell a mortgage having the features described above, namely low down payment, high-ratio, lower than current interests rates, and an unidentified mortgagor. Although the agents

added a provision requiring the purchaser to supply "personal guarantee from the shareholders" there was no information as to who those shareholders might be or whether their guarantees would be of any value. Obviously these factors would cause any potential purchaser of the mortgage to call for a higher than usual discount. Yet these factors and their effect on the potential saleability of the first mortgage and the size of the discount were not drawn to Ms. Wysminity's attention. Mr. Garner was actually told by an independent mortgage broker that evening that it would be tough to sell the mortgage, but he chose not to pass this information on to Ms. Wysminity. (Exhibit 35, Cross-examination of Garner in Jenkinson lawsuit.)

Moreover, the condition clause was deficient from the vendor's point of view in that it failed to specifically provide that the mortgage would have to be sold at a price satisfactory to the vendor in her sole discretion or, alternatively, at a discount of a specified amount or not exceeding a stated amount. As drafted, the clause left it open to Jenkinson to argue (and he ultimately did) that the vendor was obliged to sell the mortgage at whatever price she could get for it in the marketplace and regardless of how large the discount was.

Prior to her final acceptance of the Jenkinson offer, Ms. Wysminity was led to believe by Mr. Garner and Ms. Neeser that the first mortgage could be sold at a discount of approximately \$6,833.00. This discount figure had been given to Ms. Neeser by Mr. Jenkinson, who was himself a mortgage broker. It is unclear on the evidence whether Ms. Wysminity realized before or only after acceptance of the offer that the figure had come from Mr. Jenkinson. It is clear that the two agents did not confirm the accuracy of the discount figure quoted by Jenkinson with an independent source before the vendor accepted the offer. Furthermore, they failed to recommend to Ms. Wysminity that the discount figure be inserted in the signed back offer, or that she delay acceptance until the figure could be verified. Finally, they failed to confirm the discount amount through their own rudimentary calculations taking into account the interest rate spread and the term of the mortgage. In short, they permitted Ms. Wysminity to enter into the offer in reliance upon the quoted discount of \$6833 without taking adequate care and steps to protect her interests.

When Mr. Garner attempted to sell the mortgage, he discovered that the discount would be closer to \$18,000.00 or even more. As a result, Ms. Wysminity attempted to invoke the condition clause in order to nullify the Agreement of Purchase and Sale. Mr. Jenkinson took the position that the vendor was obliged to sell the mortgage at a larger discount and was not entitled to terminate the transaction. He sued the vendor and registered a cloud against the title to the property, thus preventing Ms. Wysminity from selling

it until the conclusion of the litigation almost a year later. The Jenkinson action was dismissed on a summary application, the Court persuaded that Mr. Jenkinson had provided the lower discount figure and finding that the parties intended that the discount be no more than \$6,833.00 notwithstanding that no figure was written into the contract. Mr. Jenkinson then appealed, however, the appeal was dismissed. Ms. Wysminity obtained an award of costs against Mr. Jenkinson, but has been unsuccessful in her attempts to collect such costs from him.

Although the condition clause as drafted was ultimately adequate to permit the vendor to terminate the transaction, had it been drafted as suggested above in these reasons, or had the agents recommended to the vendor that she not accept the offer until the amount of the discount could be independently determined, Ms. Wysminity would have been spared the cost, expense and aggravation of a lawsuit and the resultant delay in the sale of her home.

With respect to the second vendor take back mortgage, the Tribunal agrees that the postponement clause was deficient in that it failed to limit the obligation to postpone to any new first mortgage to one with a principal amount no greater than the existing first mortgage and/or require application of any increase towards repayment of the second mortgage. However, the failure of the two agents to rectify this deficiency would not in and of itself lead the Tribunal to conclude that the agents had breached their fiduciary duty to the vendor.

The Jenkinson offer was contingent upon the "present use residential and ultimate use professional office space" being lawful. In a separate clause, the offer, as presented, called for the vendor to warrant that "the property may be used as professional offices with parking front and rear." During the sign back stage this was revised to read, "The vendor agrees to assist the purchaser in confirming with the City that the property may be used as professional offices and include parking area in the front and rear, and the closing date to be adjusted and not less than five weeks from the date of confirmation of property use." In fact, as Jenkinson, Garner and Neeser were all aware, the property was zoned TR4, which permitted, inter alia, "a private office located in a dwelling used by the business occupant as his private residence, providing no staff is employed". In effect, this permitted an ancillary home office in a dwelling.

The clauses in the Jenkinson offer were drafted to require use as professional offices without any limitation, that is, there was no proviso that the premises would have to be used as a private residence by the business occupant or that no staff could be employed. Ms. Neeser insisted that, in fact, Mr. Jenkinson only wanted an ancillary home office without staff, but if this is all

that was required the offer could easily have been drafted to so provide. Instead it was drafted in such a way as to permit Mr. Jenkinson to insist on rezoning or a zoning variance allowing the entire property to be used as professional offices. If the present zoning was adequate, as both Garner and Neeser attempted to argue on the stand, then there would be no need to require the vendor to assist the purchaser to confirm zoning or to permit extension of the closing date for that purpose. The TR4 zoning had already been confirmed by Garner, Neeser and Jenkinson. The revised proviso did not help Ms. Wysminity, but arguably worsened it since it permitted potentially unlimited extension of the closing date until zoning or a variance was in place permitting the property to be used as professional offices. These agents failed utterly to advise Ms. Wysminity as to the potential ramifications of the "professional offices" provisions of the offer.

The latter provision of the offer dealing with use as professional offices also referred to parking "front and rear". In fact the rear parking was inaccessible by car and would be accessible only if a passageway through the front garage were created. This would necessitate demolition of a wall. Better drafting should have been used to make it clear that the vendor had to obligation to make the rear parking accessible.

Both Neeser and Garner recognized that the Jenkinson offer was a complex and confusing offer. Yet Garner failed to recommend to Ms. Wysminity that she have the offer reviewed by a solicitor prior to accepting it. While Ms. Neeser testified that she did suggest that Ms. Wysminity have a lawyer review the offer, she did not tell the vendor that she should do so before the offer was accepted. Indeed by continuing to work through the offer and revise the offer and have it signed and initialled by Ms. Wysminity, she would certainly have created the impression that there was no need for legal advice until after the offer was signed.

In summary, the Tribunal finds that this vendor did not receive the proper advice and guidance from Mr. Garner and Ms. Neeser that she was entitled to receive from two registered real estate agents who owed her a fiduciary duty. She was permitted to sign an offer that was not in her best interests without being adequately warned and advised as to its shortcomings and pitfalls. These agents were aware that Ms. Wysminity was unsophisticated about real estate matters and knew that she was relying very heavily on their advice and guidance, particularly that of Mr. Garner. Garner and Neeser allowed Ms. Wysminity to believe that they were competent to advise her as to the overall offer and as to its individual terms. Integrity includes the duty to protect the client in a competent fashion. It is dishonest to hold out that you are competent if you are not. By failing to strongly recommend to Ms. Wysminity that she not sign the offer without having her

solicitor review it first, they led her to believe that legal advice with respect to this complex and confusing offer was not required, that she could rely on the advice of Neeser and Garner alone.

Regrettably, neither Mr. Garner nor Ms. Neeser appear to fully appreciate the manner and extent to which they did a disservice to this vendor. Ms. Neeser regrets the failure to insert the mortgage discount figure in the offer, but it is not clear that she recognizes the overall failure to properly advise and protect the vendor. Mr. Garner continues to maintain that his revision to the use clause had the effect of protecting the vendor. Again, we are not satisfied that Mr. Garner fully appreciates that he failed to fulfil his duty to the vendor.

In all of the circumstances the Tribunal finds that the past conduct of Neeser and Garner, combined with the fact that neither appears to have fully appreciated that they breached a trust owed to this vendor, affords reasonable grounds for the belief that they may fail in future to conduct their dealing with honesty and integrity to the extent that a suspension of six months duration in each case is warranted.

Accordingly, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to suspend each of the registrations for a period of six months.

DAVID Y.T. HEUNG

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
JOYCE YASINCHUK, Member

APPEARANCES;

DAVID Y.T. HEUNG, appearing on his own behalf

CHRISTINA CHRISTOPHE, representing the Registrar of
Real Estate and Business Brokers

DATE OF

HEARING: 20 September 1993

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal issued by the Registrar of Real Estate and Business Brokers on July 22, 1993 to revoke the registration of the Applicant as a salesperson under the Real Estate and Business Brokers Act. The relevant facts are not seriously in dispute and are as follows.

The Applicant has been employed by the Ontario Government in various capacities since 1969. In that year he began as an employee of the Ministry of Health. In 1979, he learned that the offices of that Ministry were to be decentralized and he did not wish to move out of the Toronto area so he decided to take the course for a real estate salesperson so he could have alternate employment, if necessary, upon which to fall back. He passed the course and applied for the licence and obtained the same effective January 1, 1980 with a sponsoring broker Sincere Realty Inc. The Director's Certificate, Exhibit 5, shows that he has been registered as a salesperson with that broker from January 1, 1980 to the present time.

In 1982, the relocation of the offices of the Ministry of Health did take place, but the Applicant, in 1983 obtained a new employment with the Ontario Ministry of Government Services. From that time until the month of December 1990, he was employed in a position as a rental adjustment and audit clerk which was a clerical position in which he was not performing any functions which came within the definition of "trade" found in section 1(n) of the Act:

"trade" includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb "trade" has a corresponding meaning;

In December 1990 his functions were expanded to include the work of a lease co-ordinator and are outlined in more detail in two documents filed as exhibits at this hearing. The first of these is to be found as Schedule "A" attached to the Notice of Proposal herein which is Exhibit 4. This is a document on an Ontario Government form "Position Specification and Class Allocation CSC 6150". The purpose of the position (why does this position exist?) is stated to be "To provide administrative and operational lease support services to a regional unit" and details of what the employee is required to do are stated to be:

To provide administrative and operational lease support services to a Regional unit.

1. Administers the lease project control system for a Regional Unit by:

- monitoring and documenting the status of each lease project;

- recording and analyzing the financial status of all active lease projects to determine the financial implications of present and further lease commitments;

- liaising with all pertinent sources i.e. clients ministries or agencies, Planning Branch, Client Services, Design Services, District Office staff and Legal Branch on such matters as approvals, renewal requirements, budget allocations, status of drawings, legal documentation, etc.

2. Performs the duties of a junior Leasing Officer by performing such tasks as:

- preparing lease documentation for transacting the lease agreement either independently or in conjunction with the leasing officer;

- coordinating, negotiating and processing non-complex lease agreements, for example, per diem leases for court space, parking leases, boat storage and slips, small square footage leases;

- determining market rental of leases to be renewed by completing a market study of comparable lease premises - rental rates, lease terms and conditions, size, etc.

- negotiating lease renewals with landlords for market rent, terms and conditions.

- assessing client needs and liaising with Planning Branch, Client Services, Design Services as required in establishing renewal criteria.

3. Provides administrative support to the leasing managers by:

- maintaining the "Available Space Inventory" for a regional unit, liaising with private landlords and developers and providing information on available space for lease purposes to client ministries;

- preparing documentation to initiate lease extensions and special payments;

- responding verbally and in writing to enquiries from landlords, clients and the public on lease projects in the absence of a leasing officer or the regional manager;

- compiling, maintaining and analyzing a variety of operational data and leasing statistics for operational reports, i.e. Performance Evaluation System, market analysis reports, inventory of consultants, vendor's list, etc.

The second of these is a document dated January 16, 1992 signed by the Applicant which was attached by him to a letter dated

February 25, 1992 to Mr. Persaud, a Registration Officer with the Ministry of Consumer and Commercial Relations, copy of which is Exhibit 8 herein, and in which a summary of his present job description is given as:

Ministry of Government Services - Leasing
Services Branch
Lease Co-ordinator (OAG 11)
Northern Region

- Administering the lease project control system and prepare periodic summary reports of the status of all lease projects in the region.

- Monitoring, co-ordinating and controlling the administrative progress of critical phases in the negotiation of new leases, relocations and lease renewals for client ministry accommodation.

- Maintaining computerized and manual progress reports of the completed phases of all lease projects being managed by regional Lease Project Officers.

- Managing assigned renewal lease projects of non-complex nature e.g. per diem lease, small square footage accommodation, land lease, parking facilities, etc.

- Providing administrative support to the Regional Lease Manager, Lease Project Officers, Leasehold Administrators with extensive computerized information system, available space inventory, expiry date extension requirements and special advisory report for the Manager.

- Performing other duties such as: liaising with M.G.S. Legal Branch, Client Services, Client Ministry and Managers in respect to leasing matters and providing guidance and assistance to newly hired Leasing staff with administrative procedures and requirements.

The concern of the office of the Registrar of Real Estate and Business Brokers was first aroused by an answer given by the Applicant to question 4 on his application for renewal of his registration which he sent in on July 30, 1991, in which he gave details of Employment or Other Activities as being employment with the Ministry of Government Services as a Rental Adjustment and Audit Clerk and Leasing Co-ordinator. It was the last reference which caused the concern and the Applicant was requested to provide

some details of what "leasing co-ordinator" involved which resulted in the two documents noted above with these details.

In giving evidence at this hearing, the Registrar of Real Estate and Business Brokers, Mr. Gordon Randall, stated that, while some of the functions outlined were just of a clerical nature or otherwise not of concern to him, certain of them definitely came within the definition of "trade" in the Act and showed that in this job with the Ministry of Government Services, the Applicant was trading in real estate within the meaning of the Act on behalf of his employer and receiving remuneration therefor. Rather than repeat the parts of the two documents again herein, I have underlined those parts of the job description in each document which Mr. Randall said, in his evidence, came within the definition in question.

Another important document is Exhibit 2 herein, being a letter of August 5, 1993 from the Applicant to the Registrar of this Tribunal giving reasons for his appeal herein in which he gave the following:

1. A "Letter of Awareness" was prepared by my employer, Deputy Minister of MGS and had been forwarded to your Ministry at the end of 1992 pursuant to your Registration Officer's request.
2. An undertaking was signed by me that I will not carry on business as a real estate salesperson while employed in my current position with the Ministry. This would eliminate any perceived conflict of interest under the Act.
3. I require the renewal of my registration as a real estate salesperson not to trade in real estate as a real estate salesperson/broker but to keep the registration in order to re-enter the real estate industry when I retire from the Ontario Public Service without going through the lengthy and expensive process of reapplying for a membership and a license.

In giving his evidence, Mr. Randall said the Applicant was definitely in breach of section 30 of the Act and also was attempting to avoid the requirements of section 14 of Regulation 891 made pursuant to the Act to take the courses and retry the examinations if out of the business of real estate for a specified period of time. Mr. Randall said that, therefore, the Applicant was carrying on activities in contravention of the Act and he also

said he had reached the conclusion that the past conduct of the Applicant afforded him reasonable grounds for belief that the Applicant would not carry on business with honesty and integrity.

In answer to a direct question on this point, Mr. Randall said that the only information he had upon which he based this conclusion was the fact of his breach of section 30 and his attitude toward the problems of conflict of interest to be found in his present position. On this last point, Mr. Randall said that it was obvious that in his work with the Ministry in dealing with leases, he would get, from time to time, information which would be of value to a private broker in dealing in the lease market. Even if he kept to his undertaking not to do any private trading himself, he could divulge this information to others in Sincere Realty Inc. (Indeed, his agreement as a salesperson with that company probably requires him to impart information of value which he obtains in this area.) Whether he did disclose such information or not, the potential and the perception of conflict of interest is there and, of course, if he did disclose anything of any value, an actual conflict of interest would arise.

In giving his evidence, Mr. Heung made it completely clear that so long as he is employed with the Ministry, he will not do anything whatever under his licence on behalf of Sincere Realty Inc. in accordance with his undertaking in that regard given to the Ministry in writing on July 31, 1992. A copy of this undertaking was filed as Exhibit 10 and reads as follows:

I, David Yam-Tim Heung, Lease Co-ordinator, Northern Region, Leasing Services Branch, Ministry of Government Services, hereby undertake not to carry on business or trade in real estate as a real estate salesperson, or use my registration as a real estate salesperson under the Real Estate and Business Brokers Act in any way while I am an employee with the Province of Ontario in my capacity as Lease Co-ordinator, Northern Region, Leasing Services Branch.

I further undertake that should I change employment from my current position but remain within the Ontario Public Service, I will notify my current Deputy Minister as to any perceived conflict of interest in accordance with the Regulation 881 under the Public Service Act.

Mr. Heung went on to say that he presently wishes to begin the course of study to become a registered broker under the Act and to proceed to get that registration. He fears that he may have to take early retirement from the Ministry when he reaches 55 years of age in two years and he wishes to have a broker's registration for an alternate source of income. He indicated that, even if he could stay on longer (a maximum would be another ten years to age 65) sooner or later he would be in this position. He stressed that he did not seek to continue the registration to use it while still employed with the Ministry with all the attendant problems of conflict of interest, but rather to have it so he could pursue his broker's licence (for at least one of the required courses of study for a broker's registration one must be a registered salesperson) and to be able to go actively into real estate with Sincere Realty as and when he left the Ministry. In his final submission, Mr. Heung said he would be satisfied with a conditional registration, the condition being that he would not carry on any activities pursuant to his licence so long as he was still with the Ministry.

The Tribunal must now consider and come to its conclusions as to whether these facts support the Registrar's Proposal for which two reasons are given:

1. In the Registrar's opinion, Heung is not entitled to registration under section 6 of the Act as Heung is carrying on activities that are, or will be, if Heung is registered, in contravention of this Act or the regulations.
2. In the Registrar's opinion, Heung is not entitled to registration under section 6 of the Act as the past conduct of Heung affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The first of the Registrar's grounds for revocation of the registration involves no question of discretion on his part - it is a straight objective question and decision, as to whether, in these circumstances, the Applicant is carrying on activities in contravention of the Act or the Regulations. The Tribunal agrees with the Registrar's opinion that this is the case. The Tribunal finds that most, if not all of the functions stated by the Registrar to come within the definition of "trade" in fact do so and that in his employment with the Ministry, he is trading in real estate for remuneration on behalf of a person other than the broker

who is registered as his employer (Sincere Realty Inc.) and this is clearly prohibited by section 30 of the Act.

30. No salesman shall trade in real estate on behalf of any broker other than the broker who, according to the records of the Registrar, is his employer, and no salesman is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer.

The Applicant does not need the registration to carry out his duties for the Ministry because of the exemption provided in Section 5(f) of the Act:

5. Registration shall not be required in respect any trade in real estate by,

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(f) a full-time salaried employee of a party to a trade where the employee is acting for or on behalf of his employer in respect of land situate in Ontario;

Having reached this conclusion on the first ground, it might not be necessary for the Tribunal to deal with the second one. However, the Tribunal has decided it should do so as well. If, perchance, a Court reviewing this decision should disagree with our conclusion on the first ground, we should then have dealt with the second one and, in any event, we are of the view that we should deal with some of the reasoning and arguments put forward on behalf of the Registrar with regard to it.

The decision made by the Registrar here is a discretionary one on his part. He has concluded that the past conduct of the Applicant comes within the provision of section 6(1)(b) of the Act. It was clear upon Mr. Heung's own evidence that from December 1990 on, with his new task as a leasing co-ordinator he knew he had these problems and he knew that others in the Government service had similar problems; he did not bring the problem to the attention of his employer, the Ministry of Government Services until required to get a Letter of Awareness from it for the Registrar; although he took the action of giving the undertaking not to practice under the licence while still employed with the Ministry, this in effect cost him nothing and was totally ineffective to deal with the side of the equation where the problem was (only an undertaking to do nothing by way of trading in real estate for the Ministry or anyone else other than Sincere

Realty would have met the problem); and finally his attempt to circumvent both the intent and the letter of the requirement to retake the courses and rewrite the examination for registration if out of the business beyond the required time are all acts of past conduct on the part of the Applicant which can be used to support the conclusion of the Registrar. The question which the Tribunal must determine is whether it considers the Registrar right or wrong in concluding that these acts afford him reasonable grounds for his belief. The responsibility of the Tribunal on this point is set out in the decision of Re: Brenner 19 CRAT 58 at page 60:

... the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

It is the Registrar who is given the discretion in this matter, not the Tribunal. The Tribunal should not reverse the Registrar even if it concludes that it might have come to a different decision if it had had the discretion, but only if it can go so far as to say that the Registrar was wrong in his conclusion. Looking at the facts we have here upon which the Registrar reached his decision, the Tribunal is not able to say that the Registrar was wrong and it must uphold his decision on this ground.

Therefore, by virtue of the provisions of Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JOHN HERBERT JOHNSTON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
MICHAEL E. LERANBAUM, Member
GARY ZALEPA, Member

APPEARANCES;

JOHN HERBERT JOHNSTON, appearing on his own behalf

GARY CONWAY, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF

HEARING: 8 February 1993

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal of the Registrar of Real Estate and Business Brokers issued on August 28, 1992 to refuse to grant registration as a real estate salesperson to the Applicant upon the ground that his past conduct afforded the Registrar reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty.

The Particulars upon which this conclusion was based by the Registrar fall into two main categories, the first being the fact of certain criminal convictions and the second being evidence of dishonesty shown by the Applicant in the manner in which he disclosed or reported these convictions in his written application.

The facts of the convictions are:

Offence	Date of Conviction	Sentence
1.(1)Uttering (2 chgs.) (2)Fraudulently Obtain Accommodation (2 chgs.)	October 11, 1966	(1-2) Susp.sent 1 yr. prob. on ea. charge
2.(1)Fraud (2)Possession	February 23, 1968	(1-3) 12 mos. def. & 6 mos.indef.on ea chg.

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|-------------------------------|-------------------|
| (3) False Pretences (9 chgs.) | conc. |
| (4) Breach of Probation | (4) 12 mos. conc. |

- | | | |
|--|-----------------------------------|-----------------------|
| 3. Conspiracy to
traffic in a
narcotic | December 27, 1985
at Kitchener | 4 years |
| 4. (1) Conspiracy to
traffic in a
narcotic | May 8, 1986
at Toronto | 5 years, 6 mos. |
| (2) Traffic in a
narcotic | May 8, 1986
at Toronto | 5 years, 6 mos. conc. |

The evidence of dishonesty in disclosing these convictions in applications for registration consists of the following:

On November 22, 1972, Mr. Johnston applied for a licence as a car salesman and falsely stated in that application that he had never been "charged, indicted or convicted under any law of any country, state or province thereof of a criminal offence." In fact, he had at that time the aforementioned convictions in 1966 and 1968. The office of the Registrar of Motor Vehicle Dealers and Salespersons discovered this record three weeks after he was registered and contacted him and his employer to discuss the situation only to learn from the employer that Mr. Johnston was no longer there and from Mr. Johnston himself that he did not intend to continue in that business, and he did not oppose the revocation of his licence at that time.

On November 5, 1990, he wrote to the Registrar of Real Estate and Business Brokers advising that he was considering taking this course and applying for a real estate salesperson's licence and stating that he had a conviction for conspiracy to traffic in marijuana. He asked for advice in the circumstances of what chance he had of getting his licence.

The Registrar's office replied that the Registrar personally reviewed applications from Applicant's with criminal records and that every application was dealt with on its own merits and, therefore, no general statement about it could be made in advance. The reply added that since the Applicant knew the circumstances of his own convictions best, he might get some help with his question by reviewing the relevant published decisions of the Tribunal.

When he came to make his application for the registration which is dated March 31, 1992, he answered the question about convictions and charges pending "Yes" and attached a letter in which he disclosed "my previous criminal conviction...on Dec 27/85" for which he stated he was sentenced to a term of 68 months (two months more than the longest sentence of five and one-half years, but perhaps calculated on the basis of two extra months by reason of the other previous conviction in Kitchener). In fact, he had disclosed only one of these three narcotics convictions but he did not hide or minimize the length of the sentences. He made no disclosure whatever in this document of the previous convictions in 1966 and 1968.

In his defence, the Applicant said that he read the instruction in the Note following the question in the form:

Where the applicant has been previously registered, list only those convictions which have occurred since the date of the last filing

as a proper basis for a decision not to list the earlier convictions which were prior to his filing for the car salesman's registration. In answer to a question on this point, the Registrar Mr. McKenna, said that he considered the instruction did apply to such a filing under another Act regulated by the same Ministry. This opinion concurred with the conclusion reached by the Applicant. One would have to question whether this result should follow in the case where there had been a failure to make proper disclosure in the earlier filing (as is the case here). However, in this case, the Applicant knew that the Ministry in fact had the knowledge of his earlier convictions.

The Applicant also on the advice and suggestion of the Registrar's office went to his own solicitors to send a clarification of the situation to the Registrar which they did by a letter dated June 9, 1992 in which they straightened out the facts accurately for the Registrar and stated that the Applicant had not reported the earlier convictions for the reason set out above. Considering all of these facts, and the fact that he wrote to the Registrar before commencing the real estate course disclosing that he had been convicted of trafficking in narcotics, the Tribunal comes to the conclusion that all of the conduct on his part with regard to the reporting and disclosure of criminal convictions is not conduct which provides reasonable grounds for concluding that the Applicant will not act with honesty and integrity. To be fair to the Registrar in his presentation of his case, it should be added that his counsel stated in argument that, on this ground alone of the Applicant's reporting and disclosure of convictions, the Registrar was not of any strong view that the

application should be refused.

This brings us to the considerably more difficult question of the conclusion which should be reached when we consider the effects of the convictions themselves. The Tribunal has considered these effects in three different respects - first the effect of the fifteen fraud and theft related convictions in the 1960's, second, the effect of three serious narcotics conspiracy and trafficking charges in the 1980's and thirdly, the effect of a pattern shown in both sets of convictions of a willingness to break the law when a desire to obtain personal objectives reaches a certain height. To deal with these, the Tribunal must also take into account the evidence of the circumstances of the charges and the convictions which we were given and the evidence of the reaction of the Applicant to all of this from time to time.

Fraud and theft related convictions are always of special concern in this context as they are rooted in dishonesty and always contain an element of deceit. Without any mitigating circumstances, these alone would justify the Registrar in his conclusion. We have two sets of mitigating circumstances here and the Tribunal must determine whether they are sufficient. The crux of these is that, in his own evidence the Applicant unreservedly acknowledged that what he did was wrong and he gave an explanation of some length of how he wanted so much to be "somebody" and the bad luck of a knee injury destroyed his future as a hockey player and led him to write these bad cheques to get things which made him feel important in another way. However, the Applicant made it clear that he gave the Tribunal this information only as an explanation and not in any way as an excuse for what he had done. The second of the mitigating circumstances was the length of time which had elapsed during which he has not resorted to such conduct. In this case, this time must be considered in the light of the later narcotics convictions as well and we shall deal with this issue as it applies to all of the convictions.

The convictions for conspiracy to traffic and for trafficking in narcotics under the Narcotics Control Act are for very serious offences for which our society has developed a zero tolerance. The Applicant faces a high onus in his effort to convince the Registrar and this Tribunal that these convictions, of themselves are not a bar to his being registered. However, a perusal of a good many previous decisions of this Tribunal makes it clear that the existence of convictions, no matter what they are and when they are does not operate as an automatic negative answer to such an application and the facts of every case must be considered on their own merits. See Israel Jakobs case (1987) 16 CRAT 222 p.226: "A criminal record, of itself, is not necessarily a bar to future registration." See also Lloyd Ripani case (1989) 18 CRAT 356 at p.362: "But even with these general principles,

there is an overriding principle; namely, that in protecting the public interest, the Registrar must treat each case as an individual matter." It follows from this that there can always be an case in which the mitigating circumstances should lead the Tribunal to find in favour of the Applicant in spite of the adverse conclusion of the Registrar and, therefore, the question always becomes - is this such a case?

The evidence by the Applicant as to his realization of the magnitude of his offences and his remorse therefore, appeared genuine to the Tribunal. He stated very strongly that drugs are evil and what he did was evil. While serving his sentence, he began going into highschoools to warn students against drugs and since his release, he has done a very considerable amount of this and of speaking at service clubs and otherwise in this cause. With his background, he has a credibility with those who need such warnings which someone who had not been there does not possess. He said that one reason he has put so much effort into this without gain for himself is to pay back something to society for the damage which he did to it.

In presenting his case, the Applicant brought before the Tribunal some quite impressive evidence from three witnesses, one representing his prospective employer if he is granted his licence and two other character witnesses. Bruce Malcolm was the General Manager of a Building Systems Company from 1988 to 1990 for which the Applicant was Sales Manager for Western Ontario. Mr. Malcolm hired the Applicant when he was aware of his criminal record which caused him some concern, but he and his people decided to give the Applicant a chance. Mr. Malcolm said that the Applicant had an excellent record handling large sales, substantial deposits sometimes in cash and he received many praises and no criticisms for his work. He also said that the Applicant had occasion to come to his home where he gave his eighteen year old son valuable counsel against the use of drugs and altogether, in his view, was a first-class salesman, a first-class friend and a first-class citizen. A second officer from that company, Steve Swalm, the Manager of the office said that the Applicant always did everything properly, handled cash deposits up to \$25,000 and once up to \$30,000 and many smaller ones and had a good relationship with everyone.

Michael Saunders is an officer with P.E. Olsen Realty Ltd., the broker which will employ the Applicant as a salesperson if he is registered. Mr. Saunders said that he had known the Applicant for thirteen years and has seen a "dramatic turn around in him". He referred to the extensive work he has done and is doing to help combat drugs in the community. He said that when he was going away on a trip last year, he left his 12-year old son with the Applicant to look after and he spoke highly of the real

benefit the latter has been to his family and to other young people. Mr. Saunders said he was glad to come to this hearing to help the Applicant and to repay something of what the Applicant had done for him and for others. He said that his company is anxious to have him as a salesperson and will take seriously and perform properly all supervision which can be considered appropriate to guide him properly in this new venture.

The Tribunal is grateful to these witnesses for their assistance with this case. All too often, we have before us applicants who raise these same issues and provide us with no assistance to reach conclusions in their favour except their own evidence which cannot escape being, to some extent, self-serving.

The Applicant also provided us with a number of letters being testimonials or character references in his support. While these carry considerably less weight than the testimony given by witnesses before us, they are impressive here and are probably of more value because they corroborated and are corroborated by the viva voce evidence of the witnesses aforementioned. One from the manager/broker of P.E. Olsen Realty Ltd. states that he would be happy to accept the Applicant on the basis of his keeping the Registrar informed of his conduct, one from his former parole officer speaking completely favourable of him, one from an American Scholarship Assistance Program speaking most highly of his help to young people in the combatting of drugs and in coaching sports and speaking of "the sincerity and integrity with which he peruses his work", and letters from his wife, his brother who worked for twelve years at the Ontario Ministry of Community and Social Services and is now studying to become a Baptist Minister like their father, and one from another friend which letters show a complete confidence on the part of their writers that the Applicant is now a good citizen and will conduct himself with honesty and integrity.

In considering the conclusion it must reach here, the Tribunal must also consider very carefully the evidence of Mr. McKenna the Registrar. He is the man to whom the Real Estate and Business Brokers Act gives the discretion and the responsibility of exercising this discretion which he has done here in refusing this application. It is a clearly established principle of law that the Tribunal cannot simply substitute its discretion for that of the Registrar if it would have come to a different conclusion. To overrule the Registrar, the Tribunal must reach the conclusion that, upon all of the evidence before it there are not reasonable grounds for reaching the conclusion reached by the Registrar. To be fair to the Registrar, it must be noted that we had before us at this hearing a considerably greater amount of evidence on behalf of the Applicant than was available to the Registrar so that the reaching of a different conclusion on it will not be a finding that the Registrar was necessarily wrong in the conclusion he reached

upon the information which he had. The Registrar himself stated in his evidence that this was a difficult case for him, and by implication that it is a difficult one for the Tribunal. The Tribunal found this piece of evidence of some real assistance in making the difficult decision required of it here and is appreciative of the Registrar's giving us this assistance.

The Registrar acknowledged that, when all the facts are considered, the allegation against the Applicant arising out of his actions in reporting and disclosing information concerning the convictions does not appear to be so serious, but on the facts of the convictions themselves he felt that he had no alternative but to protect the public from the risk of dishonest conduct on the part of this Applicant if he were to be registered.

The Registrar referred to what he identified at the outset as a pattern shown by the Applicant of turning to crime to get something if he wanted it badly enough. Dealing with the very serious narcotic offences the Registrar was concerned that these were not "spur of the moment offences", they required extensive planning over a period of time, they showed a strong element of greed to get a big payoff and all this was done by a mature man in his 40's and not by a headstrong youth. He also stressed the fact that this Applicant was the one in the conspiracy to dispose of the substantial quantity of narcotics which the conspirators brought into Canada and he did this by making contact with and doing business with persons whom he knew to be dangerous criminals, namely, members of a biker gang. The Registrar fears that faced with temptation to make a substantial gain on a real estate transaction, the Applicant might again resort to dishonesty and deceit if the occasion arose.

In summing up his position, the Registrar said that, while the Applicant's present good intentions are admirable more time must pass before this passage of time can be considered a material change in circumstances which should justify the changes of the conclusion which must be drawn from the fact of the convictions themselves.

This last observation on the part of the Registrar appears to the Tribunal to be the crux of this case. The Tribunal has no hesitation in finding that the Applicant is honest and sincere in his good intentions and that, if there are cases where an Applicant with such a record can be licensed (which we have already determined above to be the fact), this is such a case, provided that the passage of time is such as to provide the needed material change in circumstances. To answer this question the Tribunal must seek the guidance of previous decisions on this point.

We refer first to the Gary Gordon case (1989) 18 CRAT 289. This was also an appeal from a refusal by the Registrar of Real Estate and Business Brokers to licence an applicant as a salesperson. Mr. Gordon had fourteen convictions for fraud and theft, and crimes of violence including assault, forceable confinement, unregistered and restricted weapons and pointing firearms stretching from October 1956 to May 1981. His application for registration was made in September 1988 which was refused. The hearing before the Tribunal was in May 1989. The evidence was that he had been an alcoholic which was the cause of his troubles and that he had stopped drinking altogether, and it was the evidence of four character witnesses that he was a changed person who for eight years never drank, was responsible to his wife and friends, had a steady job and ran a successful business. His wife who had been the victim of one of the assault charges (before they were married) said he was indeed changed and she now trusted him completely. In reaching its decision in this case, the Tribunal said that the principles to be considered for reformation and rehabilitation in the case of Lloyd Ripani (1989) 18 CRAT 356 and refers to the following passages. On page 359 it states:

The recent conduct of the Applicant is also to be given some weight, particularly in view of the concepts of reformation and rehabilitation espoused by our society and the general public to whom the Registrar is responsible. Present society, particularly since the enactment of the Canadian Charter of Rights and Freedoms in 1982, now propounds the principle that when a sentence has been served, if there is sufficient evidence of true reformation, then the individuals should be entitled to return to a responsible position in the community. The Tribunal cautions that it is not suggesting there should automatically be registration of applicants after a specified time, rather these principles should be applied to the circumstances of each application: the nature of the offence, the sentence imposed, acceptance of responsibility for the offence by the applicant, conduct of the applicant, evidence of moral reform.

The Tribunal then went on to discuss a number of cases.

Reference was made to the Kenneth Chartrand case heard by the Tribunal July 13th, 1988. The facts of that case are

vastly different from those in the present case. Chartrand was continuing under parole until 1993 and exhibited no sense of remorse. Chartrand exhibited a moral blind spot in respect to trafficking in narcotics, considering it to be just a business. Mr. Ripani on the other hand indicated that he had caused embarrassment to his family and felt that he had learned his lesson. Evidence was presented to the Tribunal that he could be trusted with money. He also acknowledged that he knew that the two convictions registered against him were for wrong acts and that he was trying to overcome these in the Hamilton community where he was known and where knowledge of the convictions was common.

In the two Sunderland cases referred to this Tribunal Brian F. Sunderland (14 CRAT (1985) p.98) and Brian F. Sunderland (16 CRAT (1987) p.125), there are several distinguishing features: namely, that parole had not been completed and that the evidence of good conduct was therefore not of sufficient strength to show reform. These cases may perhaps more readily be compared to the Faccenda case to which reference has previously been made. But in the case of Mr. Ripani, parole is complete and evidence presented to this Tribunal is of a current nature.

In a number of cases referred to this Tribunal, registration has been permitted on certain conditions or has been refused because of special circumstances as the following examples indicate.

In the Daniel Tessier case (16 CRAT (1987) p.261), Tessier had been convicted of trafficking and in fact appeared still to be somewhat immature when appearing before the Tribunal. But the Tribunal was satisfied that Tessier was intent on reform and directed that he be registered when his probation period was completed in October 1988.

In the Ruby Richman case (15 CRAT (1986) p.212), the Applicant had served his sentence and exhibited a reformation in his conduct, but was authorized to be registered only if he made restitution of the more than \$400,000 which as a lawyer he had taken from his clients.

In the Ronald W. Northover case (13 CRAT (1984) p.292), registration was refused because the Applicant had failed to make restitution. It is conceivable that the Tribunal could have gone the way of other Tribunals and granted registration conditional upon restitution. It should be noted, however, that under the provisions of Section 10 of the Act, if Northover were to make restitution he would be entitled to make a new application showing material changes in circumstances, so that the decision of the Tribunal in 1984 is not substantially different from the decisions where registration has been granted on terms and conditions.

In the Steve Herman case (11 CRAT (1982) p.184) and the James Leslie Downey case heard May 5th, 1988, as well as in the many Consent Orders filed in argument with this Tribunal, registration has been granted, but terms and conditions have been imposed.

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then certain terms and conditions will be imposed. But even with these general principles, there is an overriding principle; namely, that in protecting the public interest, the Registrar must treat each case as an individual matter. This does not mean that the Registrar may act capriciously or inconsistently. Rather it

means that while the Registrar must treat each individual equally as is set out in section 15 of the Canadian Charter of Rights and Freedoms, nevertheless, there may be certain circumstances which require the Registrar to refuse registration or to impose terms in order to protect the consuming public.

.....

Further after discussing these cases, the Tribunal goes on in the Ripani case to state at p.362:

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then certain terms and conditions will be imposed. But even with these general principles, there is an overriding principle, namely, that in protecting the public interest, the Registrar must treat each case as an individual matter. This does not mean that the Registrar may act capriciously or inconsistently. Rather it means that while the Registrar must treat each individual equally as is set out in section 15 of the Canadian Charter of Rights and Freedoms, nevertheless, there may be certain circumstances which require the Registrar to refuse registration or to impose terms in order to protect the consuming public.

This Tribunal has in these reasons indicated some of these considerations as they affect the applicant for registration, but there may be others which affect the community and which require the Registrar not only to be fair to the applicant, but also to demonstrate certain standards of moral integrity of registrants to the public at large. Thus matters such as the effects of financial loss to a large segment of the community, a breach of trust, or a callous disregard

for people or the laws of this province and country are all matters to be considered by the Registrar.

In the Gary Gordon case, the Tribunal went on to find (at p.295):

We believe that the Applicant has met the requirements of each of those principles and that registration should be granted to him, subject to certain terms and conditions. We find that the past conduct of Gary Gordon does not afford reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty.

The terms and conditions imposed were that for the period of the registration granted Mr. Gordon he was required to work for the broker sponsoring him and could only change to a new broker if the latter agreed to the conditions and if the Registrar agreed with the change; that the broker should closely supervise Mr. Gordon and that the broker had to make quarterly reports to the Registrar.

The opposite result was reached in the Israel Jakobs case quoted above in another context. Mr. Jakobs was convicted in 1982 of possession of a stolen credit card and again in 1986 of theft of diamonds (for which he substituted zircons) from his employer, a jeweller, which constituted a serious breach of trust. There were mitigating circumstances which the Judge took into account in imposing a relatively light sentence of 90 days to be served on week-ends and counsel for Jakobs at the hearing argued that these were not given sufficient consideration by the Registrar in refusing this registration. He also called character witnesses. The application of Jakobs was made prior to February 1987 because that was the date of the Registrar's Proposal and the Tribunal hearing was in June 1987. Jakobs also had a problem because of a weak financial position, but this consideration was less important than the consideration of his criminal record and the Tribunal upheld the Registrar with the words found at the bottom of page 226:

In the Tribunal's opinion, on the evidence before it, not enough time has elapsed between Mr. Jakob's last conviction and his application for registration to show that, indeed, Mr. Jakobs has turned over a new leaf and that his past conduct will not be repeated in the future. In these circumstances, registration subject to terms and conditions is not appropriate.

The case of Stuart A. Montgomery (1988) 17 CRAT 257 involved convictions for narcotics and the Tribunal upheld the Registrar saying not enough time had passed. The Tribunal commenced its Reasons for Judgment with the words: "This is a very sad case" indicating sympathy for the Applicant, but upheld the Registrar stating on page 258:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal has before it conduct of less than one year to override criminal conduct of 16 years' duration. This Tribunal finds that this is insufficient time for it to determine in the interest of the Ontario public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

The Tribunal has reached the conclusion that, following the benchmarks provided by the foregoing cases and principles, the passage of time which has elapsed here since the last criminal conduct of the Applicant, taken together with the other evidence to which we have referred of his reformation, does in fact constitute a change in material circumstances as contemplated in Section 10 of the Real Estate and Business Brokers Act and, following the course taken by the Tribunal in the Gary Gordon case, has concluded that the Applicant should receive his registration upon terms and conditions. We have already referred to the fact that we have given some weight to the evidence of the Registrar and the submissions on his behalf which acknowledged that this was a difficult case and not an easy decision to make.

Accordingly by virtue of the authority vested in it by Section 9(4) and (5) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal but to register Mr. Johnston subject to the following terms and conditions:

1. For the period of this registration, his registration and employment as a salesman shall be with P.E. Olsen Realty Ltd. under its supervision and monitoring; such supervision and monitoring shall include approving his advertising, listing agreements and sales agreements and contacting purchasers and vendors for whom he arranges a completed agreement.

2. Such registration shall not be transferred to another broker without the written consent of such broker to abide by all of the terms and conditions attached hereto and without the written consent of the Registrar.

3. During the period of his registration, P.E. Olsen Realty Ltd. shall report to the Registrar on a quarterly basis on the comportment and behaviour of Mr. Johnston and upon the manner in which he satisfies the requirements of the Real Estate and Business Brokers Act and the Regulations made thereunder.

4. In the event that there is a breach of any of the foregoing conditions, the Registrar shall have the discretion forthwith to revoke the registration.

In addition to imposing these terms and conditions, the Tribunal also urges Mr. Johnston to continue with his community service work and particularly that related to the campaign of anti-drug use and abuse and to provide as much service to his community as he reasonably can do in this regard.

ILZE KABLINGER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
SELWYN CHARLES, Member.
MAURICE LAMOND, Member

APPEARANCES;

ILZE KABLINGER, appearing on her own behalf

ROBERT CONWAY, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF

HEARING: 28 January 1993

Toronto

REASONS FOR DECISION AND ORDER

The Proposal of the Registrar not to register the Applicant was based on three grounds:

1. The preparation of a false Agreement of Purchase and Sale by the Applicant while registered as a real estate salesperson;
2. Non-disclosure of a judgement against her; and
3. Trading while unregistered.

At the outset of the hearing, this last ground was abandoned by counsel for the Registrar.

The facts relating to this matter are as follows. The Applicant Ilze Kablinger has been continuously registered as a real estate salesperson from December 7, 1981 through to December 13, 1990, at which time her registration was terminated by reason of the termination of her employment by her broker for having prepared a false Agreement of Purchase and Sale and endeavouring to mislead her first mortgagee so as to forestall foreclosure on the Applicant's farm.

In the Registrar's Proposal dated April 30, 1992 in respect to the two issues continued as the basis of the Registrar's Proposal, the Registrar relied upon the facts of the falsified Agreement of Purchase and Sale respecting the Applicant's property

as a basis for refusing her registration. With respect to the failure to disclose the outstanding judgment, the Registrar relied upon the fact that not only had the judgment not been disclosed in the application for registration dated February 21, 1991, but that the judgment was still outstanding. In the course of evidence before this Tribunal, it became clear that the judgment had been paid in full out of the proceeds of a Power of Sale transaction which closed April 26, 1991. The facts did indicate, however, that at the time the application for registration was filed with the Ministry on February 26, 1991, that judgment by the second mortgagee of the property was in fact outstanding.

The evidence before the Tribunal clearly indicated that the Applicant was experiencing extreme financial difficulty in the late summer and fall of 1990. The Applicant indicated that the second mortgagee was causing substantial difficulty and that the first mortgagee was commencing foreclosure proceedings while Mrs. Kablinger was endeavouring to refinance. As a result of the circumstances, the Applicant prepared an Agreement of Purchase and Sale under date of November 30, 1990 between herself and Paul Merrett, the owners of the property and an individual by the name of Howard Lee as purchaser. This Agreement was marked upon to give the impression of its having been signed back and called for a closing of January 30, 1991. The Agreement indicated a purchase price of \$330,000 and apparently in the subsequent Power of Sale proceedings, the property sold for \$325,000. The evidence clearly indicated that the Applicant forwarded a copy of the Agreement of Purchase and Sale to Security Trust the first mortgagee and within a week, Security Trust having made inquiries of the purported purchasers' real estate agents, the falsity of the document came to light resulting in the termination by the broker Mrs. Campion of the Applicant's employment on December 13, 1990.

The evidence of Mrs. Campion and of her office manager, Mr. Shelton was that the property had been listed for sale through the Campion real estate offices. Mrs. Campion further testified that she went to Security Trust to request them to permit her firm to proceed on the Power of Sale transaction which was granted and Mr. Shelton offered the property for sale which was completed April 26, 1991 arising from an offer obtained in the latter part of February 1991. As indicated out of the proceeds of the Power of Sale transaction, the first and second mortgagee were paid in full, all costs of the proceedings were paid and there were some surplus funds available to Mrs. Kablinger and Mr. Merrett. Mr. Shelton testified that this action of Ilze Kablinger was totally out of character and in his view an aberration caused by her extreme distress and concern for her animals on the farm. In fact, Mrs. Campion testified that the first mortgagee allowed Mrs. Kablinger to keep her animals on the farm until the end of December while the property was being shown for sale purposes.

With respect to the second issue of the non-disclosure of the judgment, it is to be noted that this judgment was in fact that of the second mortgagee who was fully paid out of the proceeds of sale.

Mr. Shelton testified that the application for reinstatement was only filed at a time when it was known that a substantial offer was coming in. Mrs. Kablinger's evidence was that she was unaware that in fact the second mortgagee had obtained a judgment. While it is the view of this Tribunal that it is incumbent upon an Applicant fully to disclose information, having observed Mrs. Kablinger in the witness box, the Tribunal is of the view that she may have been under such stress at the time and may have honestly believed that there was no judgment, notwithstanding the fact that it was issued on November 30, 1990; that it was tied in with the general foreclosure process relating to the farm. The Tribunal also notes the testimony of the Registrar that if there had been medical reasons for the preparation of the false agreement and the non-disclosure then some consideration might have been given to the Applicant's reinstatement documents.

It was submitted on behalf of the Registrar that the Brenner decision (re Richard G. Brenner (1983) 19 CRAT 58) should be applied by the Tribunal in not lightly overturning the decision of the Registrar not to grant registration. The Tribunal also notes, however, the wording in the Brenner decision which indicates that past conduct is to be considered. In the view of this Tribunal, while not at all condoning the actions of the Applicant, the Tribunal is of the view that these actions of Mrs. Kablinger in November and December 1990 were, in fact, an aberration brought upon by the stress of the mortgage actions and were not, no matter what the appearance may be, rational acts. Mrs. Kablinger must have realized that some enquiries would have been undertaken by the mortgagee and that the true facts would have been found out very quickly and in any event, the only time that she was buying was to January 30, 1991. The Tribunal does not condone either the failure to disclose the judgement except in the same area of concern that it was an application made within several months after her termination. The Tribunal also notes that both Mrs. Campion and Mr. Shelton are prepared to have Mrs. Kablinger work with them in a community small enough to be aware of the circumstances of this case. Taking all of this into account, the Tribunal finds that the past conduct of Mrs. Kablinger taken in its entirety is not sufficient to deny her application for registration. The Tribunal is concerned, however, that these actions by a registered salesperson in falsifying an Agreement of Purchase and Sale which is the very essence of real estate trading should be seen to be condoned in any way. The Tribunal notes that in fact Mrs. Kablinger has been prohibited from operating as a real estate salesperson for more than two years but is of the view that there

should be an appropriate suspension of her ability to trade in order that a clear message be sent to the industry and to the public at large as to the requirements of honesty and integrity in salespersons registered under the Act. The Tribunal is also of the view that the Applicant should only be registered under certain terms and conditions:

Pursuant to the authority vested in the Tribunal under the Act therefore, and recognizing the fact the Applicant has been suspended from registration for more than two years, the Tribunal hereby directs the Registrar not to carry out his Proposal but to suspend the registration of the Applicant for a further period of four months from the date of the release of this decision and thereafter to register the Applicant upon the following terms and conditions:

For a period of one year following the reinstatement of the Applicant, the Applicant is to be registered with a broker who will agree to supervise the Applicant and report quarterly to the Registrar during that year upon the activities of the Applicant as a salesperson; initially such broker with whom the Applicant is to be registered will be Homelike/Campion Real Estate Limited operated by Eileen Campion, provided that any transfer of the Applicant's registration shall be only to another broker who will agree to abide by these terms and conditions.

LARRY I. KLEINMINTZ

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION
UPON RE-APPLICATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
SELWYN CHARLES, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

LARRY I. KLEINMINTZ, appearing on his own behalf

ALVIN TORBIN, counsel representing the Registrar under
the Real Estate and Business Brokers Act

DATES OF 26, 27, 28, 29, 30 April 1993
HEARING: 4, 5, 6, 7 May 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Kleinmintz appeals the decision of the Registrar under the Real Estate and Business Brokers Act (the "Act") to refuse to grant him registration as a real estate salesman, upon his reapplication under section 10 of the Act.

On November 23, 1990, Mr. Kleinmintz re-applied for registration. By Proposal dated December 10, 1991, and further particularized in a Notice dated April 20, 1993, the Registrar determined that Mr. Kleinmintz was not entitled to registration on the grounds that under section 6(1)(b) of the Act:

The past conduct of the applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

Much evidence and many arguments were presented to this Tribunal over the nine-day period during which this hearing took place. What is essential to this Tribunal's final determination is canvassed below.

As a preliminary point, many of the facts relevant to an assessment of Mr. Kleinmintz's past conduct are set out in a previous decision of this Tribunal rendered August 23, 1989. This decision was in response to Mr. Kleinmintz's appeal of the first

Proposal by the Registrar to refuse to register Mr. Kleinmintz as a salesman under the Act.

Based upon those findings of fact, the Tribunal concurred with the Registrar that Mr. Kleinmintz should be refused registration, upon the same grounds that support the Registrar's current Proposal.

This August 1989 decision was not appealed. Mr. Kleinmintz was present during this first hearing, which took place over a period of 10 days, and he was represented by counsel throughout the proceeding. Further, Mr. Kleinmintz, by affidavit sworn April 29, 1991, stated that he did not dispute the findings of fact made by the Tribunal in its decision.

Those findings of fact will not be summarized again in a second Tribunal decision. They are not disputed by either party.

It is sufficient for the purposes of this hearing to note that Mr. Kleinmintz was found by a previous Tribunal to have committed very serious improprieties in the conduct of his travel business, which he operated from 1976 until 1987. The Tribunal stated at page 15 of its decision that: "When one observes the actions of the Applicant overall, they cumulatively demonstrate a lack of integrity and honesty".

Those actions of Mr. Kleinmintz include:

- 1) allowing the three travel industry corporations that he variously owned and operated to continue with serious working capital deficiencies; this continued despite repeated requests for rectification from the Registrar under the Travel Industry Act from 1983 until termination of registration and corporate bankruptcy in November 1987;
- 2) undertaking in writing to the Registrar in November 1986 to inject \$150,000 to be used as working capital to cover existing deficiencies; this money was to remain in the corporation until the elimination of any working capital deficiency. Not only did Mr. Kleinmintz fail to carry out his undertaking, he carefully gave the appearance of compliance, thus deliberately misleading the Registrar that the problem was resolved;
- 3) undertaking in writing to the Registrar in November 1986 to commence operating a trust

account for all consumer deposits and payments, which after the summer of 1986, Mr. Kleinmintz failed to maintain, despite reassurances to the Registrar; these trust monies were used instead to eliminate a \$300,000 loan for which Mr. Kleinmintz was personally liable along with his company, within a week of his corporate bankruptcy in November 1987.

The Tribunal concluded at page 11 of its August 1989 decision that: "as concerns the trust accounts and the \$150,000 debenture, all the acts of Mr. Kleinmintz were calculated to allay the fears of the Registrar while, in fact, not giving effect to his undertakings".

As a result of the working capital deficiency of Mr. Kleinmintz's company, beginning November 1987, the Travel Compensation Fund was obliged to replace funds deposited by consumers for travel services in the amount of some \$400,000.

These actions by Mr. Kleinmintz are relevant to an assessment of his past conduct for the purposes of the Act. However, this Tribunal considers Mr. Kleinmintz's conduct subsequent to the August 1989 decision to be more significant in such an assessment.

Since the August 1989 decision of this Tribunal, new facts cited by Mr. Kleinmintz in a letter to the Registrar's Office, dated August 22, 1991, include his assignment into bankruptcy on January 3, 1990, and his unconditional discharge on May 24, 1990. As well, a lawsuit commenced by National Trust Company, the trustee of the Travel Compensation Fund, for the amount of \$310,000, was settled, requiring Mr. Kleinmintz to pay National Trust \$43,000. Mr. Kleinmintz also completed the Ontario Real Estate Association course, thus meeting one of the requirements for eligibility to re-apply for registration.

Additionally, in this August 1991 letter, Mr. Kleinmintz asserts that he has changed his attitude towards business and dealings with the public, that he is now financially responsible and that in his employment he is fulfilling his duties to customers with integrity and trustworthiness.

In response, the Registrar in testimony regarded Mr. Kleinmintz's bankruptcy and unconditional discharge, as well as the settlement with National Trust, to constitute past conduct that is at best neutral.

What is more difficult to assess is the less tangible -the assertion by Mr. Kleinmintz that he is a changed man since the

findings by this Tribunal in August 1989, and that his past conduct up to that point should not foreclose his registration under the Act.

This Tribunal notes that what is at issue here, and what forms the basis of the Registrar's current Proposal, is not Mr. Kleinmintz's financial responsibility. It is his past conduct up to and including his conduct at this most recent hearing that must be assessed in order to determine whether the Registrar had reasonable grounds to conclude that Mr. Kleinmintz would not conduct his business in accordance with the law and with honesty and integrity.

Relevant past conduct includes, as conceded by the Registrar in testimony, the adequate disclosure made by Mr. Kleinmintz to the Registrar in his re-application dated November 23, 1990.

It also includes a false disclosure by Mr. Kleinmintz in his application in another regulated industry, on February 18, 1992, to the Superintendent of Insurance.

As particularized in the Registrar's Further Notice dated April 20, 1993, Mr. Kleinmintz applied in February 1992 for renewal of his license to carry on business as an life insurance agent in Ontario. Question 9 of that application, which this Tribunal notes is similar to that contained in applications under the Real Estate and Business Brokers Act, asks for disclosure and particulars about any criminal convictions or criminal proceedings pending. In response to question 9 of this insurance application, Mr. Kleinmintz declared that he had never been convicted of any criminal offenses and that no criminal proceedings were pending.

However, the evidence is that on February 2, 1992, Mr. Kleinmintz was arrested at his home. Later that day, Mr. Kleinmintz signed a Promise to Appear, which specifies that he understood that he had allegedly committed the criminal offenses of theft over \$1000 and possession over \$1000; as a consequence, he was required to appear in criminal court on March 5, 1992. Further evidence is that these charges were withdrawn on October 14, 1992.

Yet just over 2 weeks later, on his February 18, 1992 application to the Superintendent of Insurance, Mr. Kleinmintz failed to disclose these criminal proceedings pending against him, despite clear evidence that he knew of them. This application includes a signed declaration by Mr. Kleinmintz that his statements and answers in the application are "true and correct".

The application also required an additional declaration by a sponsoring person who was licensed with the Superintendent. This declaration is signed by Mr. John Bucks, Agency Manager, to the effect that: "All statements and answers contained in the foregoing

application are true and correct to the best of my knowledge, information and belief".

Mr. Bucks testified at this hearing that he relied upon Mr. Kleinmintz to complete the application truthfully and in good faith. He stated that Mr. Kleinmintz did not ask his assistance to complete the application. Mr. Bucks further testified that he would have expected Mr. Kleinmintz to respond "Yes" to question 9 and also to inform Mr. Bucks, his agency manager, of the criminal charges.

Mr. Kleinmintz called many character witnesses, many of whom worked in the insurance field. With one notable exception, they all testified that they would have responded "Yes" to question 9 of the application, if presented with the same circumstances as those facing Mr. Kleinmintz in February 1992. A few of these witnesses also testified to Mr. Kleinmintz's quick comprehension and ability to understand difficult contracts in the insurance field.

Only one witness, Mr. David Emery, who assists the agency manager, Mr. Bucks, would have answered "No" to question 9 as Mr. Kleinmintz did. Mr. Emery testified that Mr. Kleinmintz asked for his interpretation of the meaning of question 9 on the application. He further stated that Mr. Kleinmintz disclosed only that he had been charged with theft. Mr. Emery assumed on little basis that the charge arose out of Mr. Kleinmintz's bankruptcy.

Mr. Emery testified that he believed the question referred only to criminal convictions or appeals, the latter being interpreted to mean all pending criminal proceedings. However, Mr. Emery admitted in cross-examination that he has never consulted with a lawyer about the meaning of question 9. He further agreed that it is vital that the regulator, upon request, be informed of criminal charges pending against applicants in order to monitor the outcome of the charges.

In the view of this Tribunal, there is no basis for Mr. Emery's interpretation of the meaning of question 9. Nor is there a basis for believing that Mr. Kleinmintz would or should have found such a self-serving interpretation plausible, given evidence of his quick comprehension of difficult contractual language.

Mr. Kleinmintz testified that if he were responding to question 9 today, he would still answer "No" but he would append an explanation.

However, Mr. Kleinmintz failed completely to provide an explanation to the Registrar respecting the criminal proceedings pending against him from February 2, 1992, despite repeated requests to do so.

In February 1992, the issue of Mr. Kleinmintz's entitlement to registration as a real estate salesman was still alive; this was a result of the notice of appeal to this Tribunal, dated December 11, 1991, which had been filed by Mr. Kleinmintz in response to the Registrar's Proposal dated December 10, 1991, to refuse registration.

Thus, the Registrar of Real Estate and Business Brokers wrote Mr. Kleinmintz on February 24, 1992, requiring him to confirm the criminal charges, provide all relevant dates and identify the precise nature of the charges. In this regard, Mr. Kleinmintz was to include a copy of the Summons. The Registrar, as he is empowered to do under section 13(17) of Regulation 891 under the Act, required all this information to be provided in affidavit form by March 15, 1992.

Mr. Kleinmintz promptly wrote a letter dated March 2, 1992, and received March 6th by the Registrar. However, he provided little of the specific information that had so clearly been requested by the Registrar.

In the March 2, 1992 letter, Mr. Kleinmintz stated his solicitor was of the position that the information requested by the Registrar was public record and as such, the Registrar had full access to such information. Mr. Kleinmintz further stated that all of these matters would be fully addressed at the hearing before this Tribunal. Finally, "as a point of good faith", Mr. Kleinmintz stated that he was providing all available information, that is, that charges had been laid February 2, 1992, and that his next court date was March 5, 1992, in Newmarket. He did not identify the precise nature of the charges.

The Registrar wrote again on March 11, 1992, requesting the same information in affidavit form by March 30, 1992. Mr. Kleinmintz replied in affidavit form sworn March 29, 1992, but the only information that he provided was his next court date, being October 8, 1992. Mr. Kleinmintz stated that a copy of the Summons was no longer in his possession but that he was providing "all information to the best of [his] recollection". Again, Mr. Kleinmintz asserted that all of the information requested was public record to which the Registrar's office had full access.

Two additional letters seeking the same information issued from the Registrar's Office, dated April 7 and May 7, 1992. In the letter of April 7th, Mr. Kleinmintz is clearly put on notice that failure to respond to the requests of the Registrar under section 13(7) of the Regulation to the Act may well constitute further ground for refusal of registration on the ground of lack of integrity as required by the Act. It is made equally clear to Mr. Kleinmintz that he is not relieved of his legislated obligation to

provide the information requested by the Registrar simply because the information is available from another public service or because Mr. Kleinmintz may provide the information eventually before this Tribunal.

In the May 7th letter, a final deadline for receipt of the information is set for May 31, 1992. Mr. Kleinmintz is also advised that a Notice of Further and Other Particulars respecting his failure to respond may be issued by the Registrar.

Mr. Kleinmintz's final response is a letter dated May 20, 1992. He states that he has answered all the Registrar's questions to the best of his ability. However, he requests specification of any questions that have not yet been satisfactorily answered.

Mr. Kleinmintz testified before this Tribunal that he never disclosed to the Registrar the nature of the charges against him nor did he ever provide a copy of the Summons or ask his lawyer to do so on his behalf.

This is so despite Mr. Kleinmintz's testimony that his arrest at his home on February 2, 1992, was extremely upsetting to him. He stated that he understood at that time that he had been charged with theft. Despite what Mr. Kleinmintz described as the trauma of his arrest, he stated that he threw out the Promise to Appear.

Mr. Kleinmintz further testified that he met with his lawyer shortly after his arrest before writing his first letter of March 2, 1992, to the Registrar. He said his lawyer advised him to respond to the Registrar's letter of February 24, 1992, but he choose to forego his lawyer's assistance in formulating his responses to the Registrar. Under cross-examination, Mr. Kleinmintz stated that there was no part of the Registrar's correspondence that he did not understand.

Mr. Kleinmintz before this Tribunal now concedes that he was wrong in failing to disclose the information requested by the Registrar.

In the view of this Tribunal, despite Mr. Kleinmintz's assertion that he has changed his attitude toward his business affairs and his dealings with the public, he has not changed his attitude towards the regulator.

Mr. Kleinmintz's correspondence from February 92 until May 92 served no other purpose than to give the impression that he was complying with the Registrar's request for information, but without giving effect to that request. This is very similar to his conduct towards the Registrar in the travel industry respecting the \$150,000 debenture in 1986 - 1987.

In this Tribunal's view, Mr. Kleinmintz's past conduct demonstrates a consistent pattern of avoiding compliance with the regulator and misleading the regulator in the process. He does this by seeking to appear to be in technical compliance with the regulator but without satisfying the essence of compliance.

An example is Mr. Kleinmintz's letter of March 2, 1992. He replies promptly to the Registrar's request with just enough information to be seen as 'complying' but he ultimately fails to disclose the information requested. He provides only the date of the laying of the criminal charges and his next court date, which precedes by one day, the receipt of his letter in the Registrar's office.

This letter is in response to a clear question by the Registrar asking Mr. Kleinmintz to identify the charges laid against him. Mr. Kleinmintz, in a lengthy series of correspondence, never disclosed this simple bit of information, although it was always within his knowledge. Timeliness of response cannot be equated with adequacy of response.

The Registrar took pains to clarify the information requested in a series of correspondence, setting anew various deadlines for receipt of this information. Mr. Kleinmintz's correspondence from February until May 1992 served as a smokescreen and belied his testimony that he tries to cooperate with the Registrar.

Even Mr. Kleinmintz's own evidence does not corroborate his assertion that he has changed his attitude and can now be viewed as one who will conduct business in compliance with the law and with honesty and integrity.

Mr. Kleinmintz called many character witnesses who, for the most part, were consistent in their testimony respecting Mr. Kleinmintz's determination, capacity for hard work and potential for success in sales and service. There is little doubt for this Tribunal that Mr. Kleinmintz is capable of significant financial success in the life and disability insurance field.

These character witnesses also testified generally that they had little or no awareness of the August 1989 decision by this Tribunal or of the extent of the losses of consumer monies paid out by the Travel Compensation Fund.

With little knowledge of Mr. Kleinmintz's past, their testimony and in some cases, their written commendations, suffer from the same lack of disclosure by Mr. Kleinmintz as do his applications to regulators. Just as the regulators in the travel industry, the real estate industry and the insurance industry were misled by Mr. Kleinmintz's lack of candour so too was Mr. Bucks, his

agency manager, for example, in the February 1992 insurance application.

Mr. Kleinmintz's re-application to the Registrar in November 1990 did contain adequate disclosure, and in this respect, was exceptional. However, unlike the situation with a new regulator in the insurance field, there would be no benefit in non-disclosure, given Mr. Kleinmintz's history with this Registrar.

In the view of this Tribunal, there is clear evidence in the past conduct of Mr. Kleinmintz's that his attitude towards authorities is such that he cannot be effectively regulated. The result is that Mr. Kleinmintz's re-application to work in an industry that is regulated to protect the public must fail. He cannot be viewed as an applicant who would conduct business in compliance with the law, which undoubtedly includes compliance with the regulator who is acting pursuant to the Act.

It is important to keep in mind the overriding function of this Tribunal. In the case of Alexander Bodon (1984), 13 CRAT 247 at 257, the Tribunal noted that "its function and that of the Registrar in the first instance is not to punish. It is to protect". The position taken in this case by this Tribunal is designed to protect the public and to acknowledge the public perception through the registration of an individual. Any other perception as to the main function of this Tribunal would be faulty.

It is also important to keep in mind that the past conduct of Mr. Kleinmintz that predominates in this Tribunal's assessment of the reasonableness of the Registrar's current Proposal is Mr. Kleinmintz's conduct since the August 1989 decision of this Tribunal. Granted Mr. Kleinmintz's past conduct at issue in that decision was so blatant that it could hardly be rendered benign in the short passage of time from the August 1989 decision to Mr. Kleinmintz's re-application in November 1990.

However, in Mr. Kleinmintz's case, this passage of time has not even been benign so as to help resuscitate his entitlement to license in the real estate industry. His relevant past conduct includes his conduct in continuing to mislead regulators by giving the appearance of compliance with little substance. This includes Mr. Kleinmintz's testimony before this Tribunal, which at times was evasive and self-serving in the opinion of this Tribunal.

We note that the applicant in the Nicolak case (1991) responded promptly to the Registrar's request for clarification of a criminal proceeding pending against the applicant and not disclosed on the application. However, the applicant in that case disclosed the charge pending against him in the first

correspondence and offered an explanation, found to be credible by that Tribunal, for his failure to disclose.

The Divisional Court in Re Brenner (1983) directs the Tribunal to consider recent past conduct in its assessment of past conduct. This direction was considered by this Tribunal in the Hayes case (1990). When this Tribunal does so, the Registrar's case is strengthened.

Given the standard of review enunciated by the Divisional Court in the Brenner case (1983), this Tribunal cannot find under the circumstances that the Registrar erred in concluding that Mr. Kleinmintz's past conduct disentitled him to registration, upon the grounds that Mr. Kleinmintz is not prepared to carry on business in accordance with the law and with honesty and integrity.

Accordingly, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to register the Applicant under the Act.

WINSTON W. LAROSE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
DAVID APPEL, Vice-Chairman as Member
A. DONALD MANCHESTER, Member

APPEARANCES;

WINSTON W. LAROSE, appearing on his own behalf

ROBERT CONWAY, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 8 December 1992

Toronto

REASONS FOR DECISION AND ORDER

Winston LaRose, a real estate broker in Burlington, applied for renewal of his registration on June 11, 1991. According to the Certificate of the Director (Exhibit 8), he had been registered continuously as a broker since June 28, 1974.

The application for renewal contains a question:

Are there any unpaid judgements outstanding against the applicant? If yes, submit a copy of each judgement. State amount outstanding and repayment arrangements.

LaRose replied with the answer "Yes" to the question and provided the following particulars of the outstanding judgements:

- i) unsatisfied second mortgage in the amount of \$23,000 for 58 Harrison Street Hamilton
- ii) attachment of property at 336 Main Street West, Hamilton, and
- iii) guarantor to H.F.C. regarding 58 Harrison and a personal line of credit in the amount of \$4,500.00

with monthly payments of
approximately \$500.00;

Receipt of this information initiated a search by the
Registrar's office which culminated in the following disclosure:

.....

- b) \$23,640.88 plus costs and interest,
dated November 14, 1990 to 766350
Ontario Inc., c.o.b. as Goldmore
Financial Services against Garfield
Winston LaRose, Charlotte Nora
LaRose and Winston LaRose;
- c) \$5,647.54 plus costs and interest,
dated March 31, 1980 and renewed
February 26, 1986 to John B.
McFarland against Roraima
Developments Inc., Ewart Culley and
Winston LaRose;
- d) \$6,698.82 plus costs and interest,
dated September 29, 1988 to Graeme
Melville Litteljohn against Leonora
LaRose and Winston LaRose;
- e) \$25,000 plus costs and interest,
dated ??? to Ralph, Bates & Oerman
against Winston LaRose;
- f) \$9,772.16 plus costs and interest,
dated July 31, 1990 to Household
Finance Corporation of Canada
against Winston LaRose, also known
as Winston W. LaRose;
- g) \$7,120.40 plus costs and interest
dated October 26, 1990 to The Royal
Bank of Canada against Winston W.
LaRose; and
- h) \$23,435.14 plus costs and interest,
dated November 5, 1990 to 766350
Ontario Inc., operating as Goldmore
Financial Services against Jake
Kabutey, Charlotte Nora LaRose and
Winston LaRose; and
- i) \$18,245.81 plus costs and interest,
dated October 31, 1990 to Pancor

Investments Ltd. against Michael
Troy LaRose, Kevin Lionel LaRose and
Winston LaRose;

There was also a judgement of \$93,505.21 in favour of the Royal Bank in which LaRose was indirectly involved.

As a result, the Registrar declined to renew the application of the appellant, but instead issued a Proposal to revoke his registration on the grounds that he was not entitled to registration under Section 6 of the Act on the following grounds:

- (a) having regard to his financial position, Mr. LaRose cannot reasonably be expected to be financially responsible in the conduct of his business;
- (b) the past conduct of Mr. LaRose affords reasonable grounds for the belief that he will not carry on business in accordance with the law and with integrity and honesty.

The latter reason advanced by the Registrar refers to the failure of LaRose to disclose all of the judgements required by the application together with his business dealings with one Kabutey.

Called by counsel for the Registrar, Mr. Jacob Kabutey said that he had formerly been with the Wire and Cable Company in the United Kingdom and came to Burlington some three and a half years ago where he met LaRose. He said he was interested in a property as an investment and LaRose showed him 336 Main Street, Hamilton which could be purchased as a rental property for \$8,000 each if they went into partnership with the balance to be secured by two mortgages. The parties agreed to proceed on that basis, but Kabutey had to return to England before the transaction closed. He received a call there that the appraisal for a first mortgage was less than expected and they would require some \$14,000 each to close. His bank then transferred the extra funds to the lawyer retained by LaRose. The transaction thereupon closed. In the meantime, Kabutey said he had to go to Africa and when he returned to Canada found there was a third mortgage on the property in favour of Goldmore Financial Services about which he knew nothing. He said LaRose told him that he would discharge the third mortgage since it had taken the place of the cash LaRose had not contributed.

Since Kabutey was frequently out of the country, he had executed a Power of Attorney in favour of LaRose for the purchase of 336 Main Street, Hamilton. He later learned, however, that he

was a partner in the purchase of another property at 342 Main Street, Hamilton acquired by LaRose and a Mr. McKinley as a result of the addition of this address to the Power of Attorney.

Kabutey on the witness stand was asked in cross-examination by LaRose "Did you sign a Power of Attorney to me to act on the purchase of properties?". He replied "No, I signed a Power of Attorney for you to purchase 336 Main Street West, Hamilton."

Although other transactions in which LaRose involved Kabutey may be relevant to this decision, it would avail us nothing to relate them in these Reasons upon which this Tribunal bases its decision.

Kabutey, a novice in the field of real estate investments compared to LaRose, placed complete trust in the realtor's honesty and integrity. He was, however, deceived and that deception involved a change in the Power of Attorney about which he knew nothing, a third mortgage security as the property in which he had invested through the medium of the Power of Attorney and the purchase of another property again by the clandestine use of the Power of Attorney by LaRose. We find as a fact that LaRose betrayed the trust of his client for the advancement of his own interest. The tradesheets of LaRose involving the two properties 336 and 342 Main Street, Hamilton disclosed LaRose as the selling broker received a commission of \$3,585 on the former and \$3,125 on the purchase of the latter (Exhibits 9 and 11).

Dealing with the judgements, we might point out that although the Registrar is most concerned with the fact that full disclosure was not made, LaRose did answer the question acknowledging there were judgements. We are more concerned about the amount of the judgements which as of December 2, 1992, amounted to the sum of \$149,924.84 (Exhibit 3, tab 25).

It is clear that Mr. LaRose has little expectation of retiring these judgements in the foreseeable future or even of entering into a reasonable scheme for their repayment. On his own evidence, he has not recently been actively involved in any real estate sales and does not anticipate any substantial change. He is a broker and although there is no allegation of any default in trust funds, the temptation may exist as long as he has access to them. Under the circumstances, Mr. LaRose can hardly be expected to maintain an office with the overhead and expenses concomitant with that business.

The evidence adduced by the Registrar compels us to find in his favour on both grounds advanced in the Proposal. We, therefore, hereby direct the Registrar to carry out his Proposal.

KERRY LAVIGNE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
JOYCE YASINCHUK, Member

APPEARANCES;

JOHN J. WINTER, representing the Applicant

CHRISTINA CHRISTOPHE, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF 17 July, 26 August;

HEARING: 23 September 1992

Toronto

REASONS FOR DECISION AND ORDER

In this matter, an application by Kerry Lavigne for registration as a salesman under the Real Estate and Business Brokers Act, counsel have submitted a Partial Agreed Statement of Facts which this Tribunal takes as having been proved by the Registrar upon a submission by the appellant.

The Agreement entered in evidence relates the following:

PARTIAL AGREED STATEMENT OF FACTS

1. On November 6, 1990, Kerry Lavigne applied for registration as a Salesperson under the Real Estate and Business Brokers Act (the "Act"). The Application was for a "new registration," Mr. Lavigne never being previously registered.
2. Mr. Lavigne was born on June 30, 1964 and was therefore 26 years of age at the time of his application.
3. In response to question no. 6 of the application, Mr. Lavigne stated that he had never "been convicted or found guilty of an offence under any law..." and that there were not "charges now pending."

4. At the time of his application for registration, Mr. Lavigne had been convicted of the following criminal offences:

OFFENCE DATE	CONVICTION DATE	OFFENCE	PENALTY
June 9, 1985	June 20, 1985	Over 80	\$500 fine
Sep. 29, 1985	Oct. 21, 1985	Cause dist.	\$100 fine
Aug. 30, 1986	Sep. 8, 1986	Over 80	\$200 & 14 days
Aug. 30, 1986	Sep. 22, 1986	Over 80	14 days
May 6, 1986	Jan. 5, 1987	Dang. dr.	\$500 fine, 2 yr. prob.

5. At the time of his application for registration, Mr. Lavigne had outstanding charges pursuant to the Narcotic Control Act of trafficking in a narcotic and possession of a narcotic for the purpose of trafficking. These charges were stayed on November 20, 1991 pursuant to s.11(b) and 24(1) of the Canadian Charter of Rights and Freedoms.

6. Subsequent to his application for registration, Mr. Lavigne was convicted of the following criminal offences:

OFFENCE DATE	CONVICTION DATE	OFFENCE	PENALTY
May 18, 1991	Oct. 16, 1991	Fail comp.	\$300 fine
	Sep. 18, 1991	Watch/beset	15 days, 2 yr. prob.

7. Subsequent to his application for registration, Mr. Lavigne has been charged with the criminal offence of breach of probation which remains outstanding and is scheduled for trial on August 5, 1992.

8. Mr. Lavigne has been convicted of the following offences pursuant to the Highway Traffic Act:

CONVICTION DATE	OFFENCE
May 13, 1986	speeding (90 in 60 kmh)
Aug. 12, 1986	speeding (70 in 50 kmh)

Aug. 12, 1986	fail use seatbelt
Sep. 22, 1986	drive while suspended
Sep. 22, 1986	fail to stop for police
Nov. 13, 1990	speeding (129 in 80 kmh)

This Agreed Statement of Facts is not comprehensive of either party's case.

Gordon Randall, the Registrar under the Real Estate and Business Brokers Act giving evidence pointed out that the root issue was the integrity of the Applicant and his failure to complete the application in a forthright manner since the Department cannot possibly check each application. He said, "His answer was totally false". The application was originally submitted on November 6, 1990. It was then returned to him because of a deficiency in completing the form and he had an opportunity to deal with it a second time. He further observed that Lavigne had an opportunity and duty to consider the application which would have been dealt with in both segment 1 and segment 3 of the real estate course.

Randall continued saying that Lavigne had a further opportunity to disclose fully the charges and convictions in his letter to the Department (Exhibit 13), but again "took it upon himself to decide he did not have to disclose". Further, there were two convictions registered after his application had been submitted and it must be noted that the conviction on September 18, 1991 of watching and besetting drew a sentence of 15 days and two year's probation. In Mr. Randall's view, the sentence of the Court has not, therefore, been completed.

With regard to the convictions, Mr. Randall said that if we were dealing only with the convictions in paragraph 8 of the Agreed Statement of Facts (the Highway Traffic Act offences), we would not be here and even if he had not disclosed them, he probably would have been registered with conditions after a serious talk in his office. He continued, "If Lavigne had made full disclosure anything short of an undertaking that he would comply with conditions would of course result in our being here today."

On cross-examination, asked why the Department did not prosecute Lavigne under Section 50 of the Act for making a false application, Randall replied that in his opinion, "Enough was enough." Refusal of registration was a sufficient enough penalty,

On the issue of probation, Randall said that, "It is a general policy in my office that when one is on probation, they are not registered." Asked by counsel for Lavigne, "Is it not then an absolute bar? How is it a reflection of honesty and integrity?",

Randall replied "because it is a part of integrity that he completes his probation successfully with no careless or wanton disregard of his probation."

Further evidence was given on behalf of the Registrar by a Constable Lake, a veteran of ten year's service on the Metropolitan Police Force. He had arrested Lavigne in June 1991 who had then been released on his own recognizance on condition that he report every Saturday to the Ontario Provincial Police. Lavigne failed to appear on two occasions as a result of which a charge of breach of recognizance was laid and a conviction was subsequently registered.

Asked on cross-examination if Lavigne had complied with the other conditions, the Officer said "No - he continually harassed an individual which led to the watch and beset charge. He did not comply with the Order not to use drugs and on September 17, 1991 in the cell admitted to me of drugs." The Officer further stated that on two occasions in August 1991 and the 10 September 1991, he attended at Lavigne's residence and warned him to leave the lady alone. He appeared, however, to have persisted in his harassment and on September, 17, 1991, was arrested on a watch and beset charge and convicted the following day.

Lavigne took the stand to give evidence and explain his conduct. He said he is 28 years old, unmarried and has a grade 12 education. His real estate application had been completed by a secretary who asked him the relevant questions. She had asked him about his impaired charges, but neither he nor she considered them important and the question which had originally been answered "Yes" was changed to "No". He said he was ashamed and embarrassed about the drug charges pending and did not disclose them because he was not guilty. With regard to previous convictions, he said he thought anything over five years old was no longer considered. He further stated that he knew he was an alcoholic and when in jail after the third charge of impaired driving, he decided to quit. As a result, he says he has not had a drink since August 1986.

Two witnesses were called to give evidence on behalf of the Applicant. The first was Christopher Leider, a broker for eight years with Century 21. He had known Lavigne for some ten years and had signed his application of November 6, 1990. He said he was not aware of the offences when he signed the application and learned of them only after the Registrar's refusal to register Lavigne. He observed that, "As far as I know, Kerry doesn't drink anymore. Perhaps he has not for three or four years." He indicated that he would be willing to employ him and work closely with him and also to accept responsibility for him. He is, therefore, willing to trust the Applicant and wants him to have a chance.

The father of the Applicant gave evidence to the effect his son had been interested in real estate for a number of years. He said he is aware of his son's alcoholism and is proud of his recovery from the disease.

In argument, Ms. Christophe, counsel for the Registrar, advances the decision of Re Brenner as the basis for the Tribunal's consideration and asks the question, "Can you find the Registrar wrong in his refusal?" The number of convictions, seven in the past seven years - thirteen including the Highway Traffic Act convictions - the pattern of conduct, clear disregard for the law, the anguish he caused Rose Crawford the girl he continually harassed, the six convictions for driving while his licence was suspended, his failure to appear when ordered to by the Court, his deliberate failure or refusal to disclose his convictions and finally his failure to disclose them even to his benefactor and contemplated employer when the application was submitted. These, she said, demand that the Tribunal approve and uphold the Registrar's Proposal.

The Applicant's counsel Mr. Winter invites us to consider the matter in the light of the main purposes of the Act. What is the mischief with which the Act is concerned. He points out that Sections 12, 13, 15 and 18 have greater application to a registrant's conduct because they deal with the conduct and maintenance of trust accounts which is perhaps the most relevant to the industry. He addresses particularly Section 18 which says:

- (b) criminal proceedings or proceedings in relation to a contravention of any Act or regulation are about to be or have been instituted against a person that are connected with or arise out of the business in respect of which each person is registered.

Mr. Winter observes that the Section deals particularly with offences connected with or arise out of the business in which such person is registered. He, therefore, argues that none of the offences of which the Applicant was convicted have any bearing on or would have any application to his engagement in the real estate trade.

This argument although not specious has in our view little bearing on the Proposal of the Registrar which was motivated by the Registrar's view of Section 6 of the Act in which he says, "Lavigne is not entitled to registration under Section 6 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

This is the allegation the Applicant must meet and in our view, there is not sufficient evidence before us to persuade this Tribunal to conclude the Registrar is wrong. The reasons recited by Ms. Christophe which do not require repetition, the very clear admonition in the Brenner case that we find the Registrar in error, the unchallenged evidence in the Partial Agreed Statement of Facts, all militate against our granting this appeal. There is finally the issue of the appellant continuing on parole. Had we decided to the contrary under Section 6, we would still be faced with the appellant having to complete the sentence of a Court. The Registrar's policy is clear on the point and we are in accord with this view.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

ERIC B. PENNEY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
SELWYN CHARLES, Member
JOYCE YASINCHUK, Member

APPEARANCES;

ERIC B. PENNEY, appearing on his own behalf

LAURIE DAVIDSON, representing the Registrar
under the Real Estate and Business Brokers Act

DATES OF 23 October 1992; 12 November;

HEARING: 11, 14, 17 December 1992.

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar of the Real Estate and Business Brokers Act rendered May 5, 1992 in which the Registrar proposed to refuse to grant registration to the Applicant. As appears in the Notice of Proposal (Exhibit 5), the Registrar stated that in his opinion the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

In the Proposal and at trial, the Registrar gave three major reasons why in his opinion the registration of the Applicant should not be granted:

1. The Applicant failed to reveal a civil judgement rendered against him in his application for registration despite a question clearly asking for such disclosure.

2. In response to questions 9 and 10 of various applications and in particular the application of October 31, 1991, in which the Applicant was asked whether he had ever had a registration or driver's licence refused, suspended, revoked or cancelled and whether he had ever been convicted of any crimes, the Applicant did not give full disclosure of such suspensions or criminal convictions.

3. The repeated convictions against the Applicant, together with the seriousness of these convictions demonstrate a flagrant disregard by the Applicant for the law and make him unworthy for registration.

The Registrar states in paragraph 15 of his Proposal as follows:

In light of all the foregoing, it is therefore the opinion of the Registrar that the past conduct of the Applicant, as evidenced by numerous convictions against him, the nature of those convictions which show a flagrant disregard for the law, the continuing pattern in conjunction with the recent occurrences of the offences, his failure to fully disclose all of the convictions against him and his failure to disclose the outstanding order for costs against him, all preclude him from registration under the Act.

The parties filed as Exhibit 6 a Memorandum of Agreement in which they set out the facts to which both parties agreed. These are contained in pages 1 through 6 and read as follows:

MEMORANDUM OF AGREEMENT

BETWEEN:

Eric B. Penney, Applicant

- and -

the Registrar,
Real Estate and Business Brokers Act R.S.O.
1990, Chapter R.4
and Regulations, as amended

PARTICULARS AGREED UPON

- 1) The parties hereto agree that the particulars set forth in the Registrar's Notice of Proposal, dated May 5, 1992 paragraphs 1. to 5. and 7. to 13. of the said Notice are true and accurate in every respect and may be relied upon by the Registrar without being proved given the Applicant's agreement of the truth and accuracy of the said particulars.
- 2) The particulars # 1. to 5. and 7. to 13. at pages 2 to 9 of the Notice of Proposal to refuse the registration of the Applicant, Eric B. Penney are all admitted and the background is as follows:
 - a) The Applicant was registered as a salesperson under the Act during certain time periods between June 16, 1977 and December 18, 1987. The Applicant was also registered as a broker under the Act during certain time periods between December 18, 1987 and October 10, 1991. The applicant's registration as a broker under the Act was voluntarily terminated effective October 10, 1991.
 - b) The Applicant reapplied for registration as a broker under the Act on or about October 31, 1991. The Applicant responded to the questions on his October 31, 1991 application as follows:

Question #8

In response to question #8 of his October 31, 1991, application which provides "Are there any unpaid judgements outstanding against you? If yes, submit a copy of each judgement. State amount outstanding and repayment arrangements on seperate sheet", the Applicant checked off "no".

Question #9

In response to question #9 of his October 31, 1991 application as to whether the Applicant has ever had a registration and/or licence of any kind refused, suspended, revoked or cancelled, the Applicant answered "yes". As well, the Applicant, then entered the following notation "Driver's License (impaired)". Full particulars in relation to the Applicant's response were not provided by him as required;

In fact, the Office of the Registrar conducted a driving record search against the Applicant and determined that he has 16 convictions registered against him for driving related offences including 6 convictions for alcohol/drug related offences, and that his driving license has been suspended 11 times as follows:

Dec. 12/71	Driving - exceeding 80 mg in blood,
Dec. 13/71	Suspended - Expiry date: Mar. 13/72 - exceeding .08 mg,
Aug. 22/72	Impaired Driving - C.C.C.,
Sept. 11/72	Suspended - Expiry date: March 11/73 - Impaired,
Sept. 28/73	Suspended - Expiry date: Sept. 28/74,
Sept. 4/73	Impaired Driving - C.C.C.,
Aug. 17/78	Suspended - Expiry Date: Feb. 17/79 - Impaired,
Jan. 24/78	Impaired Driving - C.C.C.,

May 29/82	Failing/Improper use of seatbelt-Driving,
Dec. 20/82	Suspended re: unpaid fine,
Dec. 22/82	Speeding 71 in 50 KMH,
Mar. 7/83	Disobeying red traffic light,
Jan. 20/86	Failing to have insurance card,
Apr. 7/86	Driving - exceeding 80 mg in blood,
July 25/86	Suspended - Expiry date: July 25/87 - Exceeding .08,
Jan. 12/89	Speeding 83 in 60 KMH,
May 24/89	Suspended re unpaid fines Suspension #9072494 Expiry date: March 06, 1990,
May 8/90	Driving Motor/Vehicle with no current validation on plate,
Aug. 21/90	Suspended re unpaid fine - suspension #0125687,
Aug. 30/90	Permit Use of Plate not authorized for vehicle,
Oct. 16/90	Suspended until October 16, 1992, Ability impaired - suspension #0191384,
Oct. 16/90	Impaired Driving - C.C.C.,
June 11/91	Operating motor vehicle - no insurance C.A.I.A.,
June 11/91	Driving while licence is suspended - H.T.A.,
June 11/91	Suspended until April 16, 1993, Driving while licence suspended H.T.A. - suspension # 1096210,
July 25/91	Driving while disqualified or prohibited - C.C.C.,

July 25/91 Suspended until April 16, 1994,
Driving while disqualified, C.C.C.
suspension #1128741.

Question #10

In response to question #10 of his October 31, 1991 application regarding convictions or findings of guilt, the Applicant answered "yes". As well, the Applicant, then entered the following notation "Impaired Driving, Driving while Suspended & without Insurance, Possession". The Applicant did not, however, provide full particulars on a separate signed and dated statement, as required;

In fact, the Office of the Registrar has learned that the following convictions or findings of guilt have been registered against the Applicant:

<u>Date & Place</u>	<u>Charges</u>	<u>Disposition</u>
May 27/75 Brampton	Fraud	Cond disc prob for 8 mos
Sept. 16/76 Toronto	Fail to Appear Sec 133(5) CC	Fined \$200.
Jan. 27/77 Brampton	Poss of a Narcotic Sec 3(1) NC Act	Fined \$35. i/d 7 days
Aug. 17/78 Brampton	(1) Care & Control of Motor Vehicle While Ability Impaired Sec 234 CC (2) Poss of Narcotic Sec 3(1) NC Act	(1) Fined \$300. (2) Fined \$100.
Feb. 10/81 Oakville	Poss of Narcotics Sec 3(1) NC Act	Fined \$100.
Apr. 06/82 Oakville	Poss of a Narcotic Sec 3(1) NC Act	Fined \$100. i/d 10 days
Sept. 25/84 Oakville	(1) Poss of Narcotic Sec 3(1) NC Act (2) Poss of Narcotic Sec 3(1) NC Act	(1) Fined \$500. i/d 90 days & (2) Fined \$300. i/d 30 days & 2 yrs prob conc

Oct. 16/90 Oakville	(1) Driving While Ability Impaired Sec 253 (A) CC (2) Fail to Appear Sec 145(5) CC	(1) 30 days & prob 12 mos (2) 7 days conc
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Probation	Halton Regional PF 91-01-18	Probation poss'n narcotic N74CA Start Date: 90-12-04 Expiry Date: 91-12-03 Case: 91PRO109
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- c) On or about June 6, 1977 and on or about July 17, 1979, the Applicant submitted applications for registration as a salesperson under the Act. Question # 9(a) of both these applications provided:

"Have you ever been convicted under any law of any country, or state, or province thereof of a criminal offence or are there any proceedings now pending? If yes, give full particulars"

The responses of the Applicant to this question were as follows:

<u>Date of Application</u>	<u>"Yes" or "No"</u>	<u>Particulars</u>
June 6, 1977	"yes"	"Fraud, Possession of Marijuana and Impaired Driving"
July 17, 1979	"yes"	"Impaired Driving"

- d) On or about August 3, 1983, September 1985, and October 23, 1987, the Applicant applied for registration as a salesperson under the Act and on or about December 10, 1987 and February 8, 1990, the Applicant applied for registration as a broker under the Act. Question #7 of each of those applications provided:

"Have you ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes give full particulars of all such convictions and proceedings on a separate sheet".

NOTE Where the Applicant has been previously registered, list only those convictions which have occurred since the date of last filing. "You are not required to disclose any conviction in respect of which a pardon has been granted".

The response of the Applicant to this question were as follows:

<u>Date of Application</u>	<u>"Yes" or "No"</u>	<u>Particulars</u>
August 3, 1983	"no"	none provided
September, 1985	"no"	none provided
October 23, 1987	"yes"	"impaired driving (Aug. 1987)"
December 10, 1987	"yes"	"impaired driving only"
February 8, 1990	"no"	none provided

Mr. McKenna, the Registrar, Real Estate and Business Brokers Act was the first witness to testify. He spoke first of the outstanding Judgement against the Applicant dated September 12, 1991 which he believed the Applicant was obliged to disclose in his application.

As appears in Exhibit 11, the Judgement of the Ontario Court (General Division), in which Mr. Penney was the plaintiff and the Ontario Real Estate Association was the defendant, dismissed the action and ordered that Mr. Penney pay to the Association its costs of the proceedings in the sum of \$29,232.31. Mr. Penney appealed from this Judgement and the appeal is pending.

The Registrar argued that despite the Judgement being in appeal, Penney was legally obliged to disallow it in his application since he was under the obligation pursuant to that Judgement to pay costs of \$29,232.03. Mr. Penny argued that question 8 of the application asked about any "unpaid" Judgements outstanding against him. Since the Judgement was under appeal, it could not be considered an unpaid Judgement. At the present stage, the Association had absolutely no right to execute the Judgement since it might very well be overturned in the Court of Appeal.

The Tribunal finds that Mr. Penney did not answer the question dishonestly. The Judgement is not final in that it can be overturned in the Court of Appeal. It does not at this stage therefore constitute an unpaid Judgement. Under the circumstances, given the clear wording of the question in the application form, Mr. Penney was not under the obligation to disclose the Judgement.

The Registrar then testified on the alleged failure by Mr. Penney to disclose fully his driving and criminal record on various applications that he had filed from 1977 up to and including 1991.

The Registrar went on to testify that the answers to the application show a pattern of non-disclosure which reflects on Mr. Penney's integrity and honesty. The Registrar stated that from the first applications to the last, there were always important non-disclosures accompanied by some disclosure. The failure to fully disclose over such a long period, in the opinion of the Registrar, demonstrated an intention by Mr. Penney to not answer the questions honestly.

Mr. McKenna stated that the Registrar must rely on full disclosure since he receives so many applications and cannot verify each one. Disclosure, therefore, becomes a prime test of an Applicant's honesty and integrity.

The paramount consideration of the Registrar is "public protection". The public must not be put at risk and it must be able to rely on the approval of the Registrar as meaning that the registrant with whom they are dealing does indeed satisfy standards of honesty and integrity.

The Registrar also stated that the criminal and driving offences were in themselves serious and their numbers showed a blatant disregard by Mr. Penney of the law. The pattern of substance abuse by Mr. Penney over numerous years made him unfit for registration. Mr. Penney as at the date of registration in 1991 had not shown that he had ceased this pattern of behaviour over a long enough period of time to satisfy the Registrar that he was free of his problems. Mr. McKenna stated that the public should not be exposed to salesman who are drunk or "stoned".

In cross-examination, Mr. Penney referred the Registrar to the alleged failure by Mr. Penney to disclose that he was on probation. Mr. McKenna acknowledged that the question in the application form did not specifically refer to probation, but believed that it still had to be disclosed since it was a practice by the Registrar to not grant an application until the probation period had ended.

The Tribunal finds that the Applicant was not under the obligation to disclose that he was on probation. In disclosing the crime of which he had been convicted, he had met the requirements of that question on the application form.

Mr. McKenna testified as well that no one had made any complaint to him with respect to Mr. Penney's behaviour or honesty.

Mr. Penney asked the Registrar whether he was aware of a meeting which took place between Mr. Penney and the former Registrar in 1985 in which Mr. Penney had disclosed all particulars on convictions and driving offences against him prior to 1985. At first Mr. McKenna said that he was unaware of any such meeting having taken place, but later, on referring to his notes, he acknowledged that according to the notes a meeting had actually taken place in 1985 but he did not know what occurred at that meeting.

Finally, in answer to certain questions by Mr. Penney with respect to his substance abuse problem, the Registrar admitted knowing that Mr. Penney had undergone psychological counselling at the Donwood Institute. He said, however, that it would take many more years for Mr. Penney to earn the trust of the Registrar that he would not fall again into substance abuse.

Mr. Fred Penney, the father of Eric Penney and a real estate broker himself, testified that his son worked for him from 1977 to 1982. During that time he had received no complaints with respect to his son.

He testified that his son's problems stemmed from alcoholism rather than a criminal mind. This alcoholism, however, had never affected his son's work. His son never drank on a job.

He stated that he saw a letter from the Registrar in 1985 asking for acknowledgment of Eric's criminal problems. After this was done, the Registrar gave Eric his licence.

Mr. Penney then testified that his son had not drunk in the last two years three months. He stated that he would give his son a job if he had a broker's licence and that his son had not been able to work for the last year because of not having a licence.

The next witness to testify was Mr. Eric Penney. He stated that he had received his licence in 1977 as a salesman. In 1982, he was salesman of the year. This is the last year when such an award was given. In 1985, he was certified as an instructor and taught for one and a half years full-time for the Ontario Real Estate Association.

In 1989, he began working with Alec Murray, a real estate broker, but because of the economic situation in Oakville, Mr. Murray was obliged to close that office.

On September 15, 1990, Mr. Penney enrolled in the Donwood Institute to get "detoxed" and to become abstinate. The Program ran for four weeks followed by a one-year program which monitored his progress. The final nine months included a meeting a week for group therapy.

He testified that one of his most serious convictions, in the Spring of 1991, occurred because he drove while his licence was suspended in order to go to a meeting at the Donwoods. He pleaded guilty to the charge of driving while his licence was suspended. He testified that he has remained sober and abstinate since completing the course at Donwoods.

Mr. Penney testified that he had a meeting with the Registrar on October 30, 1985 in which a complete list of his convictions was given. This was intended to cover all the non-disclosures in the applications before that date. As a result, there were only four instances of non-disclosure to questions on his driving record, viz; January 12, 1989, May 8, 1990, August 30, 1990 and July 25, 1991. The 1989 conviction was for speeding; he

was driving at 83 kms an hour in a 60 kmh zone. The 1990 convictions were for driving with no current validation on licence plate and for using a permit that was not authorized for the vehicle.

The conviction in 1991 was for driving while disqualified or prohibited under the Criminal Code. It should be noted, however, that Mr. Penney did disclose driving while his licence was suspended under the Highway Traffic Act. He testified that in his answer he did in fact give sufficient disclosure since he wrote in answer to question 10 "driving while suspended", since the same event gave rise to two convictions. The Tribunal believes that Mr. Penney gave sufficient disclosure for the Registrar with respect to this offence.

As to not revealing sentences against him, Mr. Penney said that this was not required in the application form. The Tribunal finds that Mr. Penney is correct.

The Tribunal finds on the evidence given that there was a substantial degree of disclosure by Mr. Penney from 1985 on. He disclosed the serious crimes for which he had been convicted as well as serious driving offences; this certainly alerted the Registrar to Mr. Penney's problems. At that point the Registrar could, as he actually did, get a complete record very easily.

The most serious non-disclosure occurs when an applicant answers 'no' to a question since the Registrar then has absolutely no notice of any criminal behaviour by an applicant. Where, however, the Applicant has divulged serious offences and convictions, the Registrar can no longer argue that he did not have a reading of the Applicant's history. This, however, does not free the Applicant from giving sufficient and substantial disclosure. In the present case, the Tribunal finds that the Applicant did in fact make sufficient disclosure under questions 9 and 10 of the application.

The most important ground of the Registrar for refusing Mr. Penney's application for registration is the seriousness of his convictions and driving offences, his long pattern of substance abuse, and the belief that they are indicative of the honesty and integrity which the public can expect of him. In the Registrar's view, not enough time has elapsed for the Applicant to have demonstrated that he has really changed his pattern and that he has, in fact, overcome his substance abuse problems. This problem had led to very serious criminal offences over the years. It is only at such time as he clearly demonstrates that he has, in fact, overcome the problem and can be expected not to succumb again that he would be entitled to registration.

Mr. Penney testified that even while suffering from his problems, no client had ever complained about him or his activities. He also stated that Mr. Murray, a former employer, found him a valued employee.

In cross-examination, Mr. Penney stated that one of the symptoms of his substance abuse was to deny that he even had a problem. This is what allowed him to drive while drunk and to do nothing to solve his problem.

In reply evidence, Mr. Alec Murray, a broker since 1963 testified that his firm had ten offices with 340 salespersons. He denied Mr. Penney's evidence as to the quality of his work in his organization stating that the office was not well run when Penny was Manager and that at certain manager's meetings, he could smell alcohol on Mr. Penney's breath at 9:00 a.m. in the morning. He even warned Mr. Penney at that time to stop drinking.

He stated that he asked Mr. Penney to leave prior to closing his office.

In cross-examination, he admitted that he never received any complaints from the public with respect to Mr. Penney and that he had also received no complaints from the staff.

Ms. Karen Duncan, an addiction therapist with the Donwood Institute testified next. She was judged to be an expert witness in the treatment of addiction problems.

She works full-time in the Donwood's Institute in addiction therapy and has treated more than 240 patients.

Mr. Penney was one of her clients and she felt that he had succeeded in conquering his alcoholism problem. She testified that most people abuse more than one substance when they come to Donwoods. Such people are very often convicted for impaired driving.

She was asked what her thoughts were with respect to the theory of denial and said that she did not believe in denial although other experts do. She thinks that people know when they are drinking and driving.

She believed that Mr. Penney was relapse free since his treatment, but based this belief solely on what Mr. Penney had told her.

With this, Mr. Penney concluded his examination of Ms. Duncan who was to re-appear at the final hearing date for cross-examination. Mr. Penney at that hearing informed the Tribunal that

he had not asked Ms. Duncan to return. The Tribunal at that time told Mr. Penney that he had absolutely no right to have decided on his own not to have the witness return and to have deprived counsel for the Registrar of his right of cross-examination. Mr. Penney had arrogated to himself a power which belonged solely to the Tribunal. As a result, the Tribunal stated that it would treat Ms. Duncan's testimony as simply an opinion letter and keep in mind, in referring to her testimony, that counsel for the Registrar had not had the opportunity to cross-examine her.

The final two witnesses were Jean Besant and Yvonne Radigan, both of whom worked in the real estate industry and had worked with Mr. Penney.

Ms. Besant said that she had been trained by Mr. Penney in 1989 and thought very highly of him. She went on to state that the agency of Mr. Murray in Oakville had been closed down because of economic conditions, according to a letter which she and other employees had received from Mr. Murray and which was filed in evidence. Contrary to Mr. Murray's testimony, she was never told that it was closed down because of Mr. Penney's mismanagement or drinking problem. Mr. Penney remained at the office until it was closed.

Ms. Radigan has known Mr. Penney for ten years and thinks highly of him. She also stated that Mr. Murray closed his office because of economic conditions.

The Tribunal finds that the criminal convictions of Mr. Penney are very serious and extend over a prolonged period of time. He has had a substance abuse problem of a very serious nature for over ten years. At the time the Registrar reviewed his application in 1991, Mr. Penney was still completing his program with the Donwood's Institute. His period of probation for possession of narcotics did not expire until December 3, 1991.

Under the circumstances, the Registrar had reasonable grounds for believing that Mr. Penney would not carry on business with honesty and integrity at the time of the application. His past conduct afforded reasonable grounds for such a belief.

Furthermore, the numerous offences and convictions of Mr. Penney show, over an extended period of time, a pattern of disregard of the law. He drove in 1990 while impaired.

It is not the fact that Mr. Penney only had a drinking problem, but that he also had an extensive criminal record. The drinking did not eliminate the fact that Mr. Penney made choices which gave rise to his problems. In this regard, it is to be noted that he drove without a licence even when he was sober, which

certainly demonstrated a disregard of the law.

To this long period of unacceptable behaviour, Mr. Penney has not established a sufficiently long period of reform which at the time of the application would allow the Registrar to believe that he had mended his ways, such a period should be at least two years from the date that his period of probation and treatment ended.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar of Real Estate and Business Brokers to carry out his Proposal.

SHANTA RAMOTAR

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
THERESA WALSH, Vice-Chairman as Member
MAURICE LAMOND, Member

APPEARANCES;

SHANTA RAMOTAR, appearing on her own behalf

GEORGE GLASS, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF

HEARING: 22 December 1992

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Ms. Shanta Ramotar, who is registered under the Real Estate and Business Brokers Act as a real estate salesman against the Proposal of the Registrar to revoke her registration.

By Proposal dated July 5, 1991 the Registrar proposed to revoke Ms. Ramotar's registration on the grounds that under section 6(1)(a) of the Act: "Having regard to her financial position, she cannot reasonably be expected to be financially responsible in the conduct of her business."

The basis for the Registrar's finding of a material lack of financial responsibility on the part of Ms. Ramotar is the 24 outstanding judgments filed against Ms. Ramotar as of the date of this hearing. Total face amount of these outstanding judgments is in excess of \$2,000,000 excluding interest and costs.

Ms. Ramotar appeals the decision of the Registrar principally on the basis that these outstanding judgments represent business debts incurred as a result of market conditions beyond her control and are not indicative of financial irresponsibility.

The facts are as follows:

Shanta Ramotar first became registered as a real estate salesman under the Act in November 1986. Since that time, she has

been employed by The Realty Market Inc. under Mr. Sherland Chhangar, real estate broker.

Ms. Ramotar applied for renewal of her registration by filing an application dated October 20, 1990. In response to question 5 of that application asking whether there were any unpaid judgments outstanding against her, Ms. Ramotar responded "Yes."

There was some dispute in the testimony about whether the supporting documentation detailing the judgments was adequately provided by Ms. Ramotar.

However, the issue before this Tribunal is not to determine the adequacy of the Applicant's disclosure. Rather it is to determine the financial responsibility of the Applicant for the purposes of the Act.

By letter dated May 10, 1991, Ms. Ramotar provided a list of 22 judgments registered against her. These include judgments filed in 1990 on behalf of the following, which include mortgage holders, the Applicant's solicitors and tradepersons:

CENTRAL GUARANTY TRUST CO.	\$225,240.75
CONFIRMED INVESTMENTS INC.	\$ 35,748.91
J.H. COOPER INVESTMENTS LTD.	\$ 62,179.01 \$108,612.88 \$ 57,246.28
FAMILY TRUST CORP.	\$154,661.37
GENERAL TRUST CORP. OF CANADA	\$165,855.88
HOME SAVINGS & LOAN CORP.	\$ 40,011.43
HOUSEHOLD FINANCE CORP.	\$ 10,189.71
HOUSEHOLD REALTY CORP. LTD.	\$126,336.58 \$111,450.32 \$ 26,746.53
HOUSEHOLD TRUST CO.	\$160,615.69 \$386,212.61 \$266,146.04
P & B PLUMBING & HEATING	\$ 526.79
LOUIS TAUBE	\$ 55,474.42

TORONTO PROPERTY ADVISORY LTD.	\$ 51,268.82
	\$ 34,844.41
	\$ 27,047.48

ULRICH & SHERR	\$ 4,000.67
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Additionally, the following judgment was filed against Ms. Ramotar in January 1991:

SECURITY TRUST COMPANY	\$ <u>237,052.52</u>
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TOTAL	\$ <u>2,347,469.10</u>
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A list of Writs of Execution by the Sheriff dated March 26, 1991, entered into evidence as Exhibit 8 confirms the existence of the above 22 judgments, totalling well over two million dollars in unpaid debts.

Of these 22 outstanding judgments, Ms. Ramotar stated in her letter of May 10, 1991, that most were to be lifted through the proceeds of sale of certain properties. Additionally, those judgments filed by Household Trust and Household Realty were to be lifted "as counterclaims are being initiated." Judgments filed on behalf of J.H. Cooper Investments were to be lifted on account of the bankruptcy of Mr. Cooper.

The remaining judgments, according to Ms. Ramotar, were subject to settlement negotiations. These are the judgments filed by Toronto Property Advisory Ltd., Louis Taube, Home Savings & Loan Corp., P & B Plumbing & Heating and Ulrich & Sherr.

However, Ms. Ramotar presented no factual evidence at the hearing before this Tribunal that any of these 22 outstanding judgments had been paid. She did testify that some properties had been sold and mortgages discharged, but no supporting documentation was entered into evidence. Apparently, Ms. Ramotar made no application to have judgments lifted nor initiate counterclaims.

Ms. Ramotar did enter as Exhibit 12 notice that she had filed for bankruptcy on December 14, 1992. She testified that all her financial documents had been turned over to the Trustee in Bankruptcy, but no copies had been retained. She also testified that as of the date of bankruptcy, debts of some \$400,000 remained unsatisfied.

Ms. Ramotar also testified that she had no knowledge until the date of this hearing of two more judgments filed against her, in May 1991 and April 1992, respectively on behalf of

CANADA MORTGAGE AND HOUSING CORPORATION \$105,358.10
\$ 80,047.96

According to Ms. Ramotar, her financial circumstances were the result of unpredictable real estate market changes. She testified that she bought her first residential property in 1982 and by 1990 was on title on approximately 12 to 14 properties in and around Metropolitan Toronto. Her commissions averaged about \$80,000 annually.

Ms. Ramotar indicated that she is willing to be closely supervised if she is allowed to continue to be registered as a real estate salesperson. Mr. Chhangar, the real estate broker for whom Ms. Ramotar has worked since 1986, testified that he was willing to provide what supervision he was able. If allowed to work as a real estate salesperson, Ms. Ramotar said her intention is to repay some of these outstanding debts.

However, Ms. Ramotar presented to this Tribunal no specifics for such repayment nor any particular mitigating circumstances for her present financial situation.

Mr. Ray McKenna, the Registrar in his evidence stated his concern about a pattern on the part of the Applicant of "overspending, over ambition, a lack of commitment or ability to repay debts, the large dollar amounts owing in judgments", and about the nature of her debts. Such circumstances were found to exist in the Kash decision (1991) 21 CRAT 253 in which the Tribunal upheld the Registrar's refusal to grant the Applicant registration as a real estate broker.

Additionally in the Kash decision, the Tribunal determined that registration upon condition including broker supervision was inadequate to protect the public because real estate salespersons cannot be easily supervised as is the case of motor vehicle salespersons on site.

The Tribunal finds that registration upon condition would be inappropriate here. However, the Applicant may wish to reapply for registration under section 10 of the Act if her material circumstances sufficiently change.

The Tribunal is of the opinion that Ms. Ramotar cannot reasonably be expected to be financially responsible in the conduct of her business as a real estate salesperson, given the nature and amount of her debts and her failure to present evidence of mitigating circumstances. She asks to continue working in an industry regulated to protect the public despite her failure to pay significant judgments against her obtained by many creditors,

including mortgage holders, both corporate and individual, her solicitors and tradepersons.

Following the guidance of the Divisional Court decision in Brenner v. Registrar of Motor Vehicle Dealers and Salesmen released on April 7, 1983, we support the decision of the Registrar and find no basis on the evidence presented to us by the Applicant to overturn such decision.

Accordingly by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JAMES CHARLES RIDDELL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding
MICHAEL E. LERANBAUM, Member
MAURICE LAMOND, Member

APPEARANCES;

EUGENE MCBURNEY and RISA SOKOLOFF,
representing the Applicant

LAURIE DAVIDSON, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF

HEARING: 28 January 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Riddell appeals from the Proposal of the Registrar to refuse him registration as a real estate salesperson. The ground relied upon by the Registrar is that Mr. Riddell is not entitled to registration under Section 6 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Mr. Riddell is a disbarred lawyer. The disbarment arose as a result of misappropriation of clients' trust funds. Large sums of money were taken by Mr. Riddell over a lengthy period of time. After being disbarred in 1985, the Applicant was convicted of a criminal charge in connection with the trust fund misappropriations and was sentenced to one year of imprisonment. After a short term of incarceration, followed by residence at a rehabilitation house, Mr. Riddell was released on parole. The parole term ended in June 1987. Mr. Riddell is now eligible to apply for a pardon in respect of his criminal conviction and has advised the Tribunal that he intends to do so.

Mr. Riddell was called to the bar in 1972. From that time until his disbarment thirteen years later, he practised commercial real estate with the firm of Lorenzetti, Mariani and Wolfe, where he became a partner in 1974. In addition to his full time law practice, Mr. Riddell became involved in a number of outside business ventures including a restaurant, an importing business and a manufacturing/distributing business. It was Mr. Riddell's

evidence that all of these businesses were financed by bank loans bearing floating interest rates. He personally guaranteed the loans, as did his business partners. He was, however, regarded as the prime guarantor due to his greater financial worth. Serious difficulties arose in 1983 and 1984 when interest rates rose dramatically. All three businesses suffered and, eventually, despite Mr. Riddell's efforts, all three either declared bankruptcy or stopped operating. The lenders looked to Mr. Riddell for repayment of loans in excess of \$1 million dollars.

During this time frame, Mr. Riddell's marriage was in serious trouble and was to end in divorce. The difficulty of Mr. Riddell's situation was further exacerbated by the fact that the senior partner of his law firm was also his father-in-law.

In September 1984, Mr. Riddell made a suicide attempt. He was hospitalized, but discharged himself prematurely, against advice, and returned to work.

The trust fund misappropriations appear to have started in or about July 1983, continuing until early 1985. The stolen funds were channelled into the various business ventures that Mr. Riddell was trying to keep afloat. Monies were taken and replaced from time to time. The thefts were concealed by Mr. Riddell and stopped only when a former employee reported the misdeeds to the Law Society of Upper Canada. The Law Society conducted an audit and determined that the sum of \$42,465.37 had been misappropriated over the audited period. All of the clients' funds were fully restored by the law firm. Thus none of the clients suffered a loss and no monies were paid out by the Law Society Compensation Fund. Mr. Riddell testified that when he left the law firm, he signed off his partnership interest which, he testified, had a value, inclusive of his capital account and work in progress, in excess of the funds paid by the law firm to the clients' trust accounts. In effect, therefore, Mr. Riddell made restitution to the clients involved out of his personal resources. It appears that some of the clients were never aware that there had been a discrepancy.

Mr. Riddell co-operated fully with the Law Society and did not attempt to oppose the disbarment. The Law Society did not take the matter further. However, the former employee pursued the matter with the police and criminal charges were laid against Mr. Riddell. From the documentary evidence filed by the Registrar, it appears that Mr. Riddell was first indicted on six counts of stealing trust monies of a value exceeding two hundred dollars and, in respect of the same six incidents, on six further counts of converting trust monies with intent to defraud. This first indictment was withdrawn by the Crown and a new indictment charged Mr. Riddell with one charge of theft exceeding two hundred dollars. This charge was in reference to the years 1983, 1984 and 1985 and in reference to four

different clients. A plea of guilty to this charge was entered and a one year sentence was imposed.

Prior to his conviction and sentence and after his departure from the law firm, Mr. Riddell was employed as a property manager by a former client, Mr. Carmen Di Paola, a real estate broker. Mr. Di Paola was also one of the principals behind one of the corporate clients from whom Mr. Riddell misappropriated funds. Notwithstanding that fact, Mr. Di Paola was prepared to testify on the Applicant's behalf before the Tribunal. A real estate broker since 1975 and a salesperson since 1965, Mr. Di Paola has known the Applicant since 1978 and considers him competent, responsible and trustworthy. He considers the misdeed of Mr. Riddell, of which he is fully aware, as "completely out of character". He testified that he would have hired Mr. Riddell after his release from incarceration if he had had a position available at that time.

When Mr. Riddell was released from the Mimico Reformatory in July 1986, he went to work as a marketing director for a company owned by a friend for a period of two years. The friend was fully aware of his criminal record. His friend trusted him enough to give him a company credit card. In September 1988, Mr. Riddell took a position as a construction supervisor for a construction company that was constructing a building for Compcore Realty Inc. He left that position in January 1989 to work for Compcore Realty Inc. and has been employed there as an office manager since that time. His duties also include monitoring of various municipal hearings related to commercial real estate development. Compcore Realty Inc. is the sponsoring broker in Mr. Riddell's application for registration.

The Tribunal also heard the evidence of William Dalrymple of Compcore Realty Inc. The real estate firm's business is confined to industrial, commercial and investment properties. It does not trade in residential real estate. Mr. Dalrymple described the Applicant as an excellent employee who is emotionally stable. Compcore Realty was aware of Mr. Riddell's criminal background at the time of hiring. After four years of employment, Mr. Riddell is well respected and well liked and Mr. Dalrymple testified that he has no reservations whatsoever about Mr. Riddell's character. Moreover he is prepared to undertake any supervisory conditions imposed by the Tribunal. Compcore has seven salespeople and Mr. Dalrymple expressed confidence that he could adequately monitor Mr. Riddell if supervisory conditions were imposed. Mr. Riddell, as a salesperson, would have no access to the trust account, which would be within the control of Mr. Dalrymple as broker.

Mr. Riddell remarried in 1989 and his wife also testified on his behalf. Mrs. Riddell is a teacher with a daughter from a previous marriage. She is financially independent, owns the

matrimonial home and controls the family's finances to the extent that Mr. Riddell hands over his pay cheque to her. She testified that she and her husband have a very stable family life. She feels that her husband has had time to reflect and is a changed person. There is no financial pressure on Mr. Riddell and his motivation for becoming a real estate salesperson arises, in her opinion, from a desire to be productive and to enhance his feelings of self-worth. The Tribunal observed Mrs. Riddell to be a most forthright and credible witness.

The application made by Mr. Riddell is dated February 19, 1990. He passed the Segment III Real Estate segment February 25, 1989 with a final mark of 96%. Some three years have passed since the date of the application and five and a half years have passed since the end of his parole. During that time there has not been any indication from his conduct that he will not carry on business in accordance with law and with integrity and honesty.

Counsel for the Registrar submitted that there was conduct evidencing a lack of honesty and integrity arising out of the completion of the application form itself. The Tribunal is not persuaded that this is the case. Mr. Riddell answered 'yes' to question 6 of the application which inquires regarding criminal convictions. He freely disclosed his disbarment and the misappropriation of clients' trust funds in an accompanying handwritten attachment. After referring to the Law Society disbarment proceedings, Mr. Riddell states:

My former employee, however, took it upon herself to launch a crusade with the Metropolitan Toronto Police to ensure that criminal proceedings would be taken.

Counsel for the Registrar submits that the words chosen by Mr. Riddell indicate that he has not taken responsibility for his past misdeeds and blames others for what occurred. While the words chosen were unfortunate and the tone used is one of resentment towards the former employee, the Tribunal is satisfied after hearing Mr. Riddell's testimony that he has accepted full responsibility and deeply regrets his past mistakes. He blames only himself for what happened and freely offered the comment that the former employee had done the right thing.

Counsel for the Registrar also focused on the following passage of the handwritten addendum:

"In September of 1985 I was charged with breach of trust and theft. An agreement was reached with the Crown that I would plead guilty to the charge of theft and that the

breach of trust charge would be withdrawn."

Ms. Davidson submits that this passage evinces an attempt by the Applicant to minimize the charges and/or counts that he faced in 1985 in an effort to mislead the Registrar as to the seriousness thereof. However, on the previous page, Mr. Riddell had clearly disclosed that trust funds were taken from clients over a period of time and that he was subsequently disbarred. Thus the seriousness of Mr. Riddell's past misconduct was already clearly before the Registrar. It was not incumbent on Mr. Riddell to set out the precise details of the number of counts originally laid and then withdrawn against him. The question in the application only calls for particulars of convictions. Mr. Riddell was, as he indicates in the note accompanying the application, convicted of one charge of theft. However, Mr. Riddell went further giving additional significant details, namely that he had misused client's trust funds, been disbarred, been charged with breach of trust and theft and made a deal with the Crown to plead to the lesser charge. Having raised a red flag with those disclosures, it is difficult to see what difference it would have made to detail the number of counts originally laid and withdrawn. Moreover, the Tribunal is inclined to accept Mr. Riddell's evidence that, at the time of completion of the application, he did not recall that there were originally twelve counts. Thus while we fully agree that the application is itself a test of honesty and integrity, the Tribunal is satisfied that there was no attempt by Mr. Riddell to mislead the Registrar in this case.

We note as well that the registration officer, Mr. Persaud testified that Mr. Riddell had provided full disclosure and had been completely forthright in all of his dealings with Mr. Persaud.

Mr. Riddell's conduct during the years 1983, 1984 and 1985 was reprehensible and a clear demonstration of dishonesty, lack of integrity and lawlessness. However, eight years have passed since the misconduct occurred, five and one-half years of which were subsequent to the end of his parole term. This intervening period must also be taken into consideration. The evidence we have heard indicates that Mr. Riddell is a stable family man with an excellent employment record. He is not involved in investments and his life is focused on work and home. He has regained the trust and respect of Mr. Di Paola. He has the trust and respect of his current employer and sponsoring broker, after being employed with that broker for some four years. After observing Mr. Riddell on the witness stand, the Tribunal is satisfied that he is determined not to repeat his past mistakes.

We conclude, therefore, that Mr. Riddell's past conduct taken overall does not afford reasonable grounds for belief that he will not carry on business in accordance with law and with honesty and

integrity.

Accordingly, the Tribunal directs the Registrar to grant registration to Mr. Riddell subject to the following conditions:

1. Compcore Realty Inc. is to provide a written undertaking to the Registrar undertaking to monitor Mr. Riddell's activities on a daily basis over the next two years.
2. In the event of a transfer to another broker, an undertaking on the same terms must be provided by the new broker.

VITO J. SINOPOLI

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
JACINTH HERBERT, Vice-Chair as Member
A.D. MANCHESTER, Member

APPEARANCES;
JEFFREY W. KRAMER, representing the Applicant
DON BOURGEOIS, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING: 2 June 1993 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out a Notice of Proposal to revoke the registration of the Applicant as a real estate broker. This Notice of Proposal was issued by the Registrar of Real Estate and Business Brokers on February 4, 1992. A Director's Certificate dated February 2, 1993, states that the Applicant was registered as a salesperson under the Real Estate and Business Brokers Act from May 12, 1987 to July 10, 1989, and as an associate broker with Homelife/Tri-Corp Realty Ltd. from July 11, 1989 to October 25, 1991 and as an associate broker with Homelife/5 Star Realty Ltd. from October 28, 1991 to the present time.

The reasons given by the Registrar for his Proposal are that:

In my opinion, Vito Sinopoli is not entitled to registration under section 6 of the Act for the following reasons:

(a) having regard to his financial position, Mr. Sinopoli cannot reasonably be expected to be financially responsible in the conduct of his business; and

(b) the past conduct of Mr. Sinopoli affords reasonable grounds for belief that he will not carry on business in

accordance with law and with integrity and honesty.

The conduct on the part of the Applicant upon which the Registrar based his opinion was:

(1) On at least four different occasions in August and September of 1991, the Applicant caused the company to misappropriate trust funds in its hands, being deposits received upon transactions not yet completed, by depositing the same or transferring them to the company's general bank account in a total sum of approximately \$36,300.

(2) On applications for registration or renewal of registration on April 14, 1989, June 26, 1989 and June 3, 1991, the Applicant answered "No" to the question, "Have you ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on a separate sheet." In fact, the Applicant had been convicted on September 8, 1987 of possession of a narcotic.

This hearing began with the filing of an Agreed Statement of Facts which reads as follows:

1. Vito Sinopoli is registered as a real estate broker (registration #2669087) under the Real Estate and Business Brokers Act. He is currently employed by Homelife/5 Star Realty Ltd. He was first registered on May 12, 1987 and has been continuously registered since that date. He is 28 years of age.

2. Homelife/Tri-Corp Realty Ltd. was registered as a real estate broker (registration #2252250). Mr. Sinopoli was the principal broker, president and sole shareholder of Homelife/Tri-Corp Realty Ltd. at all relevant times until its registration was terminated on October 31, 1991.

3. Homelife/Tri-Corp assigned itself into bankruptcy on or about October 24, 1991. Wasserman, Arsenault Limited is the trustee in bankruptcy.

4. Homelife/Tri-Corp maintained its Real Estate Trust Account (#012-04-000073941) and its General Account (012-04-000073955) at National Trust, 6432 Yonge Street, Willowdale, Ontario. Mr. Sinopoli had sole signing authority on the Real Estate Trust Account.

5. An inspector acting under the directions of the Registrar conducted an inspection of the Real Estate Trust Account on October 17, 1991. The inspection indicated that there should have been \$52,000 plus any earned interest in the Trust Account. There was, however, only \$15,635.24 in the Trust Account leaving a trust account shortage of \$36,364.76 and interest on the \$52,000.

6. Mr. Sinopoli was cooperative. Mr. Sinopoli admitted to the inspector that the Trust Account was short, where the shortage was and the reasons for the shortage prior to the inspector starting the inspection. He indicated to the inspector that the deficiency in the trust account was caused by his failure to deposit trust funds in the Trust Account and his transfer of those trust funds prior to closing or other termination of the transaction.

7. On at least four separate occasions, Mr. Sinopoli used trust funds to reduce the overdraft on Homelife/Tri-Corp's General Account:

- a) a \$5,000 deposit from Regina Remisch and Risto Hynynen with respect to an Agreement of Purchase and Sale, dated September 21, 1991 for 47 Kirkdene Drive, Scarborough. The \$5,000 was deposited by Mr. Sinopoli into the General Account on September 26, 1991 contrary to the Act and the terms of trust;
- b) a \$10,000 deposit from Robert and Joan Howald with respect to an Agreement of Purchase and Sale, dated September 27, 1991 for 1562 Highbrook Avenue, Mississauga was deposited by Mr. Sinopoli into the General Account on September 30, 1991 contrary to the Act and the terms of trust;

- c) \$10,000 in trust funds received from Franchelle Investments Inc. with respect to 151 Bedford Park Avenue, Toronto were originally deposited into the Trust Account. Mr. Sinopoli transferred those funds on August 23, 1991 prior to the closing or other termination of the transaction without authority and contrary to the Act and the terms of trust;
- d) \$20,000 in trust funds received from Giuseppe, Domenica, Antonio and Franco Magisano with respect to 45 Cuffley Crescent, North York were transferred by Mr. Sinopoli from the Trust Account to the General Account on August 16, 1991 prior to the closing or other termination of the transaction without authority and contrary to the Act and the terms of trust.

8. Mr. Sinopoli and Homelife/Tri-Corp were each charged with breach of trust under section 20 of the Real Estate and Business Brokers Act with respect to the transactions identified in paragraph 7. On August 12, 1992, before His Worship McNish, Mr. Sinopoli pleaded guilty to one count (Howald) and the Crown withdrew the other counts against Mr. Sinopoli. Homelife/Tri-Corp was found guilty by His Worship on the other three counts. His Worship sentenced Mr. Sinopoli to a fine of \$1,500 with 6 months to pay. Homelife/Tri-Corp was sentenced to \$500 per count, for a total of \$1,500 with 6 months to pay.

9. The trust liability to customers were satisfied from the funds that were available in the Trust Account. All transactions listed on Trust Account ledger closed and the trust liability to customers was met from the funds available in the Trust Account. As a result, not all commissions payable to salesperson or to other brokers were paid. Mr. Sinopoli has personally paid the debts to most of the salespersons and intends to satisfy the others. The estate is involved in legal action concerning a claim by an independent third party broker. Approximately \$175,000 is owed to Revenue Canada and \$97,000 to the bank for a loan. Mr. Sinopoli has personally paid the \$97,000 to the bank.

10. Mr. Sinopoli personally guaranteed the bank loan. Total indebtedness was approximately \$600,000 of the Corporation. Mr. Sinopoli has undertaken to pay all moneys still owing to former salespersons of his companies and to others for a total still owing of approximately \$15,000 to \$20,000.

The evidence concerning the conviction for possession of narcotics and the failure to disclose the same on the application forms was the following:

Mr. Sinopoli said that in 1987, he had been at a party for a friend who was about to be married and was driving him and some other persons home after the party when he was stopped by the police. The friend, who was about to be married, had placed a single marijuana cigarette on the dash in the front of the car, the police found it, and sought to establish who was its owner. Mr. Sinopoli said that he told the police that it was his cigarette in order to protect his friend. He was then charged and pleaded guilty to possession of a narcotic and a penalty was assessed of a \$250 fine. The Applicant said that he understood he would receive a notice from the Court about paying the fine and this notice never came and so he never paid the fine. Moreover, he read in a newspaper that there had been some malfunction with the computer in which the information was stored and records of many convictions were lost and he concluded that his was one of these. Before answering the questions on the forms, he had an inquiry made of some office which resulted in a reply that there was no criminal record for him and he said he concluded then that he did not have any conviction and that is why he answered the question as he did. Subsequently, the Ministry was able to obtain a Certificate from the Clerk of the Court where he was convicted in Brampton certifying as to the fact of this conviction.

Reference should be made to some of the other evidence given at the hearing.

The first witness for the Registrar was William Antonacci, the inspector who attended at the Applicant's office in October 1991 in response to some information received as to trouble there. Mr. Antonacci said that the Applicant was wholly co-operative with him, told him that the trust account was short and gave him exact details and even seemed relieved that the ordeal through which he had just come was over. Apart from the facts of the misappropriation of trust monies and some other small infractions, the inspector had only positive comments to make about the Applicant.

Next the Registrar, Mr. McKenna, gave evidence as to why he reached his conclusion. He expressed very serious concern about

the trust funds saying that there is not a more serious offence by a broker than the misuse of trust funds. Also with regard to the incorrect answers to the question concerning convictions he said that, with the large number of registrants and applicants for registration and the very limited facilities to check out these matters, the Registrar must rely heavily upon the truth of the facts set out in the application and he did not get the truth here. He also found that Mr. Sinopoli does not meet the test of financial responsibility. There was no doubt that his was the controlling mind of the company and some of the things which he caused it to do were completely unacceptable. It was the Registrar's evidence that out of 6,000 corporate brokers and 9,000 associate brokers in 1991, there were less than ten charged and convicted of breaches of trust and he was one of these.

In presenting his defence to these allegations against him, Mr. Sinopoli called the associate broker for his present employer who spoke well of him and told the Tribunal that he could continue with this employment if he keeps his licence and that his present employer was prepared to supervise and monitor any conditions which the Tribunal might impose. This witness generally spoke well of the Applicant as an employee.

In certain respects, the most important witness at this hearing was Mr. Sinopoli himself. He impressed the Tribunal as being a highly intelligent person who had achieved great success early in life. While in his 20's he had become the owner, and to a point, successful operator of a very substantial business. After he had bought the company and taken it over in 1988, while still only 24 years of age, the company had 88 sales representatives and at the height of the boom was handling 100 to 130 transactions a month. He opened a branch office in October 1989 into which he put \$350,000 of his own money. It was not a success and was closed in November of 1990. The company's difficulties continued until it made an Assignment in Bankruptcy in 1991 showing a total indebtedness of some \$600,000. Mr. Sinopoli said he had been a secured creditor and had postponed his position and was owed over \$300,000 which he lost. National Trust was owed \$97,000 which he had guaranteed and this had been paid, \$175,000 was owed to Revenue Canada which, in chief, he said he had paid and about \$42,000 was owed to in-house agents and about \$18,000 to outside brokers.

With regard to money owed to his in-house salespersons, he gave some evidence which the Tribunal considers quite significant. He said that he had already paid a good part of this \$42,000 owing to his former sales staff out of his own pocket, although it was a debt of the company and not of his. He said that he felt a moral obligation and that he had assured the remaining people that he would pay them as well as soon as he could. His evidence was that he had made \$120,000 in the first

part of this year and, if he could keep his licence, he will get the money and pay what remains which he said was between \$15,000 and \$20,000 owing to some seven or eight salespersons. In giving this evidence at one point, he stated specifically "I managed to pay over all my employees and agents and some of the other agents." It was obvious in giving this evidence that the Applicant intended to create the impression, and he did create the impression, that he was an unusually good fellow who was determined to do all this at very substantial cost to himself to meet what he considered to be his moral responsibilities although not legally required to so.

With his cross-examination and with evidence which he led, counsel for the Registrar was able to disprove all of this. The true facts are that Mr. Sinopoli has paid nothing to date to former employees. Many of them received payments, but these came from the Ontario Wage Protection Plan - out of the pocket of the Ontario taxpayers and not of the Applicant. When questioned about the \$15,000 to \$20,000 owing to seven or eight persons, he was vague and contradictory and obviously could not substantiate what he had said initially. So far as the claim of Revenue Canada goes, it came out that this is a claim for deductions from employee's pay for income tax, Canada Pension plan, and Unemployment insurance and this money was, therefore, trust money in the company's hands for which the Applicant, as well as the company, is liable in the circumstances.

It was also established that Revenue Canada is a preferred creditor, the secured creditors having all been paid, and that it will get all the money there will be from the bankruptcy and the Applicant will probably have to make up a balance still owing then.

Unlike cases which come before this Tribunal in which evidence which comes out at the hearing and was not available to the Registrar when making his decision, and which evidence may lead the Tribunal to differ with the Registrar's conclusion, this was a case where the additional evidence which came out at the hearing lends support to the Registrar's conclusion. In this most significant evidence given by Applicant, during his testimony in chief, the Tribunal has concluded that he made a deliberate attempt to mislead us.

However, the Tribunal must now look at all of the evidence and all relevant facts and determine upon these whether the Registrar has met the onus imposed upon him by the statute. The test is that set out by Southey, J. in Re Brenner (1983) 19 CRAT 58 at p.60 - "...the Tribunal should only direct the Registrar to carry out its Proposal if it thought that the Registrar was in error in concluding that the past conduct of the applicant afforded

reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

We start with the issue of the misappropriation of these trust monies. While the counsel for the Applicant urged strongly upon us the submission that no loss was sustained by anyone and that, at the time the funds were put into the general account, there was a strong probability that the transactions would close, as in fact they did, the fact remains that there was a breach of the trust regulations in the very respect which they are designed to prevent. If nothing ever went wrong with real estate transactions after an Offer is signed and a deposit paid, there would be no need to put these monies in trust at all to the limit of the commission payable. The Registrar believes misappropriation of trust funds to be a most serious offence by a broker and finds it completely unacceptable. Certainly any broker against whom an allegation of misappropriation of trust funds is established has a high test to meet if he is to convince this Tribunal that the Registrar is wrong in the conclusion which he reached here. The Tribunal finds that, upon the case put forward by him at this hearing, this Applicant does not meet such a test.

As stated by the Tribunal in the Giovanni Giannini case 14 CRAT 179:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved.

This same principle is put another way in the Peter Kodis case (1985) 14 C.R.A.T. 187 at page 190:

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance. This basic principle underlines all the consumer legislation which is set forth for the protection of the public. The Tribunal is aware of the fact that in the discharge of their employment as real estate salesmen

they may have fairly free entry into homes, often they have the keys, and property is exposed. It has been pointed out to the Tribunal that during the period of employment as a real estate salesman there were no adverse reports respecting the Applicant with regard to his dealings, no elements of fraud exhibited and, indeed, that he was a good real estate salesman. But the opinion of the Registrar and this Tribunal is not to be so restricted.

The circumstances surrounding the Applicant's failure to report the criminal conviction must also be taken seriously. The proper context in which to view this issue is set out in the cases of Gilford Garage Service and Ambury 11 CRAT (1982) p.52 and Jakobs vs. Registrar of Real Estate and Business Brokers 16 CRAT (1987) p.223. In the former, the Tribunal states at page 53:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

In the latter, the Tribunal states at page 226:

A criminal record, of itself, is not necessarily a bar to future registration. However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to

registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

In the case of Bonnie Wilson released June 17, 1992, the Tribunal dealt with the problem of the test which should be used to determine whether an explanation for submitting a false answer to this question should be accepted and said:

...It must be remembered that the Ministry receives many thousands of these applications for registration and renewal of registration every year and without a tremendous increase in facilities to deal with them and, therefore, in cost and red tape it would be completely impossible for the Ministry and for the Registrar and his office to function and deal with these applications without being able to rely fully upon the information set out on the face of each application. If none of the questions are answered to indicate any problems, the applications must be processed in a routine way and the licences issued almost automatically. The fact that any of the questions have been answered falsely on such applications will only be picked up through random spot checking or by chance.

Accordingly unless an Applicant has a real and accepted explanation that he or she honestly believed that the false information was, in fact, true at the time of its submission or unless the false information is of rather minor consequence, the Tribunal cannot overrule the Registrar. To do so would be to open the option to anyone who would prefer to conceal some information. To try doing it that way first, knowing there is always a good chance he would not be caught and even if he were caught, he would still have a chance of explaining it away

without having to meet the test as presently laid down.

The Tribunal cannot accept as a fact that Mr. Sinopoli honestly believed, at the time he submitted these applications, that he had not been convicted of a criminal offence. Therefore, he fails this test laid down in the Bonnie Wilson case.

There is a good discussion of just what the critical words in the statute are intended to mean in the case of Larry I. Kleinmintz 20 (CRAT) 500 at p.511.

...One need only consult the wording of Section 6 of the Act to see that it requires three elements: 1) that the applicant act in accordance with law; 2) that he act with integrity; and 3) that he act with honesty. If the sole requirement was that the applicant acted in accordance with law, the Legislature surely would not have added the words "and with integrity and honesty", since they would serve no purpose. Thus, the Tribunal believes that unless the Applicant can also show that he acted with integrity and honesty, the Registrar was entitled to refuse registration on the basis of his past behaviour for which he has shown no remorse.

In Black's Law Dictionary 5th Ed. on page 727, the word "integrity" is defined as follows:

As used in statutes prescribing the qualifications of public officers, trustees, etc., this term means soundness or moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity", honesty", and "uprightness."

When using the term integrity therefore or honesty, one is not simply looking at whether a person has acted within the narrow framework of the law, but also

whether he has acted with openness and in a forthright fashion.

Upon all of the evidence before us, the Tribunal has come to the conclusion, not only that it cannot say the Registrar was in error, but that it should say he was right in his conclusion that the conduct of this Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. His misappropriation of trust funds, his attempt to take advantage of a computer malfunction to avoid disclosing his criminal conviction and his deliberate attempt at this hearing to mislead the Tribunal as to material facts can lead to no other conclusion.

Therefore, pursuant to the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

NICHOLAS WEIR

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding

APPEARANCES;
PETER K. McWILLIAMS, representing the Applicant

GEORGE GLASS, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 21 September 1992

REASONS FOR DECISION AND ORDER

This is an appeal by Nicholas Weir, a former real estate salesman for reinstatement of his registration under an application dated the 2nd day of April 1991.

Weir had previously been registered from 1982 to March 29, 1989 at which time he allowed his registration to lapse motivated by reasons I will deal with later. The application form which Weir completed requires the Applicant to divulge any criminal convictions or charges in which he has been involved. Weir disclosed a conviction for fraud describing it as "fraudulent registration of title for which he was fined \$1,000." The Registrar's office in a subsequent search learned the appellant had also been convicted of driving with an excess of alcohol over .08 in his blood, but this conviction had not been disclosed.

As a result, the Registrar arranged a meeting with Weir to discuss his convictions on September 5, 1991. At that time, Weir explained that the conviction for fraud arose out of an attempt to sever his own property since a previous application to the Committee of Adjustment had been refused. The subsequent application had been found to contain certain statements and information which were, in fact, false. The charges arose from that document. With regard to the driving offence, he said he did not realize he was obliged to disclose it. It is to be noted that his application of April 2, 1991 was dated prior to the conviction on April 11, 1991. The application, however, requires information concerning any outstanding charges as well as convictions. It

appears the meeting ended with the Registrar's decision to issue a Proposal to refuse the appellant's application. The Proposal is dated November 14, 1991.

Nicholas Weir is married with two children, one at McGill University and a son aged 16 at school. He considers the real estate trade to be his only desired employment and has during the years of his service in it had no complaints. There is no evidence before us of any misconduct in his business career.

He said he became involved in the severance application through the advice of someone he had trusted because of his inexperience and had sought professional advice. I have no reason to doubt this evidence. In testifying, he stated that he had been employed with his brother-in-law who is a broker and when the charges arose he felt he should resign rather than embarrass him. As a result, he gave up his licence to practice. As far as the offences are concerned, he appealed the fraud conviction and it was set aside by the appellate court. The driving offence arose close to the Christmas season and he was caught up in the R.I.D.E. program. This conviction, he said, was also under appeal.

The Registrar in his Proposal advances one reason for his refusal to grant the appellant's registration and that is found in section 6(1)(a) of the Act: "his conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

The convictions, the one set aside and the other which may be, do not concern the Registrar so much as the conduct underlying them. In the one case, we have the attempt to gain an objective through dishonest means and in the other, we have the failure to disclose. I am willing to accept the appellant's gratuitous statement to the Registrar that he did not realize that he was obliged to disclose the latter offence in his application since at that time he had not been convicted.

But what of the more serious offence which arose out of certainly his questionable conduct? I would be inclined to take the Registrar's view if it were not for the fact that the evidence points to this man being led by the consultant upon whom he depended for professional advice. It appears that this person was also charged, but the disposition of that matter is of no relevance to this decision nor is there any evidence of it before me. Nevertheless, I cannot take the view that Weir was entirely innocent in the whole matter or that he was the complete dupe of his consultant.

Counsel for the Registrar points out that the law imposes a very heavy responsibility upon a registrant in the real estate

trade and so it should. He is entrusted with the property of his clients in their absence and they depend upon his advice in the most important transactions in which most of them will ever be involved. His honesty and integrity are, therefore, crucial to their welfare. I must balance that against the evidence before me. It is clear that this man has erred for what might be considered his personal gain. He has, however, hurt no one in the conduct of his business because only his own property was involved. In a man with an unblemished business record, that would appear to be out of character and in this matter, I consider it so. There are two character references submitted in evidence, which despite the fact counsel had no opportunity to cross-examine the authors, are in my view impressive. I further had the opportunity of hearing the evidence of the appellant and have had the advantage of a picture much larger than that available to the Registrar when he determined upon his Proposal. As a result, I am not persuaded the Registrar is correct in his Proposal at this time although he may appear to have been so when it was issued. We are dealing with the future and livelihood of a man who although having transgressed does not, in my view, present a threat to the public in the conduct of his business.

I, therefore, direct that the Registrar shall refrain from carrying out his Proposal and that the appellant shall be registered pursuant to section 6(2) of the Real Estate and Business Brokers Act upon the following terms and conditions:

1. For the period of registration, that is a period of two years or until his registration would normally require renewal, Weir's registration shall be with P.R. Oulahen, Broker, 45 Sheppard Avenue East, Suite 414, North York under the supervision and monitoring of Mr. Oulahen and such registration shall continue during the period unless changed with the consent of the broker and acceptance of the Registrar. Any substituted broker during this period shall agree with the Registrar as to the obligations imposed herein.
2. The broker P.R. Oulahen shall supervise all real estate activities of Weir, including approving his advertising, sales agreements and contacting all purchasers and vendors for whom Weir arranges a completed agreement.

AKAL TRAVEL AND TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
GURDIAL SINGH FIJI, Member

APPEARANCES:

GURMIT SINGH, representing the Applicant

ROBERT CONWAY, representing the
Registrar under the Travel Industry Act

DATE OF 30 August 1993

HEARING: 14 September 1993

Toronto

REASONS FOR DECISION AND ORDER

Contrary to the practice of this Tribunal an oral decision will be rendered today. Written reasons will be issued at a later date as soon as possible.

By virtue of the authority vested in this Tribunal under the Travel Industry Act, this Tribunal directs that the Registrar under the Act revoke the registration of Akal Travel and Tours Inc. as a travel agent effective immediately.

This Tribunal bases its decision on the evidence presented to it that Mr. Gurmit Singh, the principal of Akal Travel and Tours Inc. has failed to comply with the Minutes of Settlement signed by the parties and dated September 1, 1993 and agreed to in principle on August 30. In particular, the Tribunal finds that the Applicant has failed to comply with all of the conditions set out under section 6 of the Minutes of Settlement. The Tribunal notes for the record that all of the parties have further agreed to the condition set out under section 7 of the Minutes of Settlement which reads: "In the event that Akal Travel is unable to comply with all of the terms herein by September 13, 1993 then the Registrar shall inform the Registrar of the Commercial Registration Appeal Tribunal of that fact and the Tribunal will then direct the Registrar to carry out its Proposal without the necessity of an appearance by the parties."

It is clear to this Tribunal that the parties understood that a consequence of failure to comply with the terms of the Minutes of Settlement would be revocation of the licence of Akal.

The reasons that an oral decision is rendered today is that persuasive evidence has been presented to this Tribunal that the Applicant continues to carry on business to date despite the clear terms of the Minutes of Settlement. We refer to section 2 of the Minutes of Settlement which reads that "Akal Travel consents to the interim suspension of its registration immediately by the Registrar under Section 7 of the Travel Industry Act pending resumption of the hearing on September 14, 1993." The Registrar has stated concerns respecting the paramount consideration of this Tribunal which is that the protection of the public dictates that a decision be rendered today although this Tribunal is not without sympathy for this particular Applicant.

For the record, the above decision and reasons therefor were orally given by the Vice-Chair at the conclusion of this hearing in the presence of the other member who concurred.

ARCADE TRAVEL SERVICE LIMITED

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, Presiding
SELWYN CHARLES, Member
JOHN MCGUIRE, Member

APPEARANCES:

VLADIMIR LEKOSKY, representing the Applicant

GEORGE GLASS, representing the
Registrar under the Travel Industry Act

DATE OF

HEARING: 29 June 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Arcade Travel Service Limited ("Arcade Travel Service"), registered as a travel agent under the Travel Industry Act (the "Act"), and represented by Mr. Vladimir Lekosky, President, from a decision by the Registrar to revoke the registration of Arcade Travel Service.

The Registrar's decision is contained in a Proposal dated October 23, 1992. The basis for the Registrar's decision is his view, pursuant to section 4(1)(d) of the Act, that Arcade Travel Service is carrying on activities that are, or will be, if the applicant is registered, in contravention of the Act or the regulations.

The facts are as follows:

Arcade Travel Service has been registered as a travel agent since 1983. Mr. Lekosky was director and president at the time of the incorporation of Arcade Travel Service. Business premises were located on Front Street in Toronto.

On March 31, 1992, the Registrar wrote to Mr. Lekosky requesting that he respond to a consumer complaint from the Friends of the National Gallery of Canada by April 10, 1992. The basis for the complaint was a NSF cheque issued by Arcade Travel Service in November 1991 for \$6,655.

No satisfactory response was received and the amount remains outstanding, according to testimony of the Registrar.

Mr. Lekosky testified that he disputed the amount claimed by the Friends of the National Gallery. He also stated that he is committed to repaying the amount he believes to be owing to this organization once his financial circumstances improve.

On April 7, 1992, Mr. Ken Woods, an Inspector designated under the Act, attended the business premises of Arcade Travel Service. He testified that he was informed by Mr. Lekosky that all the bank statements necessary for his inspection were at Mr. Lekosky's home. As a result, the inspection was set up for April 10, 1992.

Mr. Wood's April 1992 inspection revealed 7 NSF cheques in November 1991, including the one to the Friends of the National Gallery of Canada totalling \$18,624.70. It was also discovered that IATA had lifted the Applicant's plates due to late reporting.

Mr. Lekosky testified that the NSF cheques in November 1991 were due to bank error, although he was unable to provide any supporting documentation.

As a result of the April 1992 inspection, Mr. Lekosky was requested to provide a) the audited financial statements for the year ending December 31, 1991, which had been due on March 31, 1992; b) quarterly financial reports commencing May 31, 1992; c) director's resolution and share certificate showing a July 1990 injection of \$30,000 of working capital; and d) a list of account receivables.

Mr. Woods testified that none of these documents have been provided by Mr. Lekosky.

On June 12, 1992, a filing history for Arcade Travel Service shows a history of late filing of financial information since 1984. Since 1987, the Registrar's Office has requested the applicant to introduce trust accounting and to inject varying amounts of working capital or to provide a letter of credit, culminating in the July 1990 request for a working capital injection of \$30,000. In 1989, the filing history shows one injection of working capital in the amount of \$21,500.

By letter dated June 16, 1992, the Registrar's Office was informed by Intra Travel that Arcade Travel Service owed it \$1403.81, for airline tickets issued by Intra to Arcade because Arcade had lost its IATA plates.

Mr Lekosky disputed in his testimony the amount owing to Intra Travel.

On June 16, 1992, the Registrar's Office received a telephone call advising of the posting of a notice on the door of the business premises of Arcade Travel Services, stating "Padlocked by Landlord".

Ms. Marie Dignum, then Deputy Registrar under the Act, testified that she was advised by telephone that this closure was temporary. She left a message requesting that Mr. Lekosky keep her advised, to which she testified that she received no response.

On August 19, 1992, by registered letter, the Registrar requested a meeting with Mr. Lekosky to discuss continued registration of Arcade Travel Service in light of its failure to file the required financial information.

Mr. Michael Pepper, Registrar under the Act, testified that this meeting took place on August 31, 1992, with both parties agreeing to terms and conditions for continued registration. The Registrar testified that Mr. Lekosky was cooperative during the meeting. The terms and conditions included:

- a) the introduction of trust accounting in accordance with section 23(2) through (9) of Regulation 938 under the Act;
- b) the filing of audited financial statements for the year ending December 31, 1991, by September 23, 1992;
- c) by the same date, the filing of interim financial statements for the first two quarters of 1992, and thereafter, quarterly financial statements at timely intervals;
- d) the filing of timely financial statements in accordance with section 16(1) of the Act and section 28 of Regulation 938 under the Act; and
- e) the timely filing of Form 1 (formerly Form 6).

On September 4, 1992, a registered letter to Mr. Lekosky detailed the terms and conditions. Mr. Lekosky was asked to sign copies of the terms and conditions, indicating his consent to them, and forward them to the Registrar's Office by September 23, 1992.

On October 5, 1992, Mr. Lekosky replied by letter proposing to deliver personally the financial statements for December 31, 1991, expected to be ready sometime in October.

The Registrar testified respecting his growing concerns about the protection of the public and consumer monies, due to the lack of satisfactory response by Mr. Lekosky on behalf of Arcade Travel Service. These concerns and his belief that Mr. Lekosky would not comply in future with financial reporting requirements under the Act led to the issuance of the Proposal dated October 23, 1992.

The Registrar's concerns continue to date. He testified that a recent inspection of the business premises of Arcade Travel Services on June 17, 1993, indicated that the premises had been vacated, without notice to the Registrar's Office.

Mr. Lekosky confirmed in his testimony that his business premises were closed in October 1992 due to a dispute with his landlord respecting repairs and rental monies due. He further confirmed that he had no access to his business records until March 1993 when he was allowed access by his landlord to remove his belongings. He currently has no business premises within which to operate Arcade Travel Service.

Mr. Lekosky testified that he now has an employment arrangement with another travel operation. Under this verbal arrangement, Mr. Lekosky expects to earn monies providing a trip to Turkey and Greece in the spring of 1994.

His current financial difficulties are, according to Mr. Lekosky, due to some substantial overdue account receivables. He admits to sloppy reporting practices but regards the outstanding financial claims against him as relatively small and denies any danger to the public from his methods of operation.

He agrees that he has not provided the Registrar the required financial information, including audited financial statements for the year ending December 31, 1991, quarterly financial statements, evidence of the working capital injection requested as of July 1990, or signed consent to the terms and conditions agreed upon in August 1992 for continued registration.

Counsel for the Registrar argued that the Applicant's continuing financial difficulties, the lack of business premises within which to operate and the ongoing failure to comply with the financial reporting requirements under the Act, all dictate that it is in the public interest to have the Registrar's Proposal carried out.

We agree. Although the Tribunal found the testimony of Mr. Lekosky to be reasonably straightforward, his admitted financial difficulties, the fact that he has no office to conduct business with the public, and his inability to comply with legislated reporting requirements render Arcade Travel Service virtually non-operational as a travel agent. Registration cannot continue under these circumstances.

In accordance with the principles set out in the Brenner decision, we cannot conclude that the Registrar is in error in finding that the Applicant is carrying on activities that are in contravention of this Act and the regulations.

By virtue of the power vested in it under section 6(4) of the Travel Industry Act, this Tribunal directs the Registrar to carry out the Proposal to revoke the registration of the Applicant as a travel agent under the Act.

EDENBRIDGE TRAVEL SERVICES (1987) INC.

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIM OF THE CLAIMANT

TO BE INELIGIBLE FOR PAYMENT

TRIBUNAL: THERESA WALSH, Vice-Chair, presiding
GERRY BEECH, Member
PETER BONCH, Member

APPEARANCES:

HAL BURNS, agent for the Applicant

SUSAN CAMPBELL, counsel representing the Board of
Trustees of the Travel Compensation Fund

DATE OF

HEARING: 23 March 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal of a decision by the Board of Trustees of the Travel Industry Compensation Fund to disallow the claim of Edenbridge Travel Services (1987) Inc. ("Edenbridge") in the amount of \$26,764.96.

The Board in its decision, dated August 26, 1992, determined that Edenbridge had not provided sufficient evidence to prove that its claim was eligible under section 15(3) of Regulation 938 of the Travel Industry Act (the "Act").

Section 15(3) deals with the claims of travel wholesalers, who having acted "in good faith" with a travel agent, may make a claim for compensation from the Travel Industry Compensation Fund, where the travel agent, has "failed to pass his client's money to the travel wholesaler [who] at his own expense" either reimburses the client or provides the travel service.

In the opinion of the Board, Edenbridge, a travel wholesaler, had provided insufficient evidence, firstly, that clients had passed their moneys to the travel agent, being Palm Beach Travel, and of the quantum of clients' money passed to the travel agent; and secondly, that Edenbridge had dealt in good faith with Palm Beach Travel.

The facts are as follows:

Edenbridge, according to the testimony of Mr. Harry Sharma, office manager, is a travel wholesaler located in Islington, Ontario, and specializes in offering trips to the Caribbean. Its clientele is composed largely of persons of West Indian descent.

Both Mr. Sharma and Mr. Alpha King, New York Regional Manager of BWIA, testified that this is a competitive market and that extensions of credit are a common practice.

Mr. Sharma testified that neither himself nor, to his knowledge, anyone at Edenbridge had any interest in or any control over the activities of Palm Beach Travel, a travel agent located in Toronto, with whom Edenbridge did business.

According to an overview prepared by Counsel representing the Board and not disputed by the Applicant, Edenbridge had provided services to Palm Beach Travel to the extent that by 26 July 1991, Edenbridge was owed \$3849.52. On 26 July 1991, Edenbridge received a cheque from Palm Beach Travel in the amount of \$2498.28, which was returned N.S.F. to Edenbridge.

Edenbridge continued to provide services to Palm Beach Travel to the extent that by 3 August 1991 Edenbridge was owed \$5612.75. By 4 September 1991, Edenbridge received a second N.S.F. cheque from Palm Beach in the amount of \$5000.

Edenbridge continued to extend credit to Palm Beach, during what Mr. Sharma termed its busy season, through the fall and early winter of 1991, so that by 3 December 1991, Edenbridge was owed a total of \$16,194.49 by Palm Beach Travel. On 3 December 1991, Edenbridge received a cheque from Palm Beach Travel in the amount of \$956.05, which was returned N.S.F. two days later to Edenbridge.

Nevertheless, Edenbridge continued to provide services and extend credit to Palm Beach Travel through the month of December 1991; by 15 December 1991, Edenbridge was owed a total of \$25,352.42 from Palm Beach. On 18 December 1991, Edenbridge received a cheque from M. Robinson, referencing certain invoices to Palm Beach Travel, in the amount of \$8663.07, which was returned N.S.F. to Edenbridge.

On 19 December 1991, the registration of Palm Beach Travel was terminated.

On January 4, 1992, Edenbridge claimed the amount of \$26,764.96 from the Ontario Travel Industry Compensation Fund

against Palm Beach Travel.

A key consideration to this Tribunal's determination of this matter is the definition of "good faith" because "good faith" is one of the legal requirements to be met by a claimant, under section 15(3) of Regulation 938 under the Act, who is seeking compensation from the Travel Industry Fund.

"Good faith" is not defined either in the Act or the Regulation. However, in materials submitted at the hearing of this matter, "good faith" is defined in the following manner:

According to Black's Law Dictionary, "good faith" is defined to include: "Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry".

Additionally, "good faith", according to Lord Blackburn in Jones v. Gordon, 2 App. Cas 616, is evident in a case where someone is "honestly blundering and careless". However, lack of good faith, according to Lord Blackburn, is evident in a case where "the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind - I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover - I think that is dishonesty."

These and other definitions of "good faith" were canvassed in a decision of this Tribunal in Carousel Travel Inc. and the Board of Trustees under the Travel Industry Act, 1976, decision released October 9, 1980. In that case, the Tribunal rejected arguments by counsel for the Board of Trustees that "good faith" means "good business practice", "sound judgement" and "prudence", qualities that Tribunal found to be lacking in the transaction at issue "to a sorry degree".

However, in the Carousel case, the transaction at issue involved a single late booking for a travel agent, amounting to some \$500 of credit extended, with an effort made by the claimant to confirm the existence of payment. The Tribunal rejected the suggestion that the claimant on the facts "had any prior notice of there being 'something wrong' which 'ought to have put it upon inquiry' such as to make its conduct 'not honest'".

Similarly, in the case of 619515 Ontario Inc. c.o.b. as Tin-Bo Travel Services and The Board of Trustees of the Travel Industry Compensation Fund, decision released November 26, 1991, the Divisional Court found nothing in the circumstances of that case to infer a lack of good faith by the claimant, a travel wholesaler, who was awarded compensation from the Fund of \$108,004.85. In that case, the claimant provided airline tickets to China, on two occasions in March and early April 1988, for clients of a travel agent that went bankrupt in early April 1988. In one transaction, the claimant demanded and received a cheque for \$84,073 on April 1, 1988, being Good Friday, which was deposited on April 3rd, being Easter Sunday. The tour to China commenced April 4th, the travel agent went bankrupt on April 6th and by April 10th, the claimant was informed that the cheque for \$84,073 would not be honoured.

As well, the Divisional Court made clear that nothing under section 15(3) of Regulation 938 under the Act prohibits the granting of credit in that claimant's circumstances.

What is equally clear to this Tribunal is that the requirement of acting in "good faith" under section 15(3) of the Regulation does not impose upon a claimant the requirement to adopt consistently good business practices, which may or may not include prudent extensions of credit depending upon the circumstances.

However, in the opinion of this Tribunal, the claimant here cannot be seen to have acted in good faith, for the purposes of section 15(3), because it is reasonable to conclude under all the circumstances that the claimant was not free of knowledge of circumstances that ought to have put it upon enquiry.

Those circumstances that ought to have put Edenbridge upon enquiry consist of a course of conduct over several months involving several separate transactions, all within the knowledge of Edenbridge, that cumulatively support a reasonable belief that Palm Beach Travel was either unwilling or unable to pay its debts for services that Edenbridge nevertheless continued to provide to it.

We thank both parties for their submissions. For the purposes of this hearing, the Tribunal bases its decision solely upon the issue of determination of good faith as required under section 15(3) of Regulation 938 under the Act.

The Tribunal upholds the decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund to deny compensation to the Applicant for the reasons stated.

ARMIN HAU

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
GERRY BEECH, Member
JOHN MCGUIRE, Member

APPEARANCES:

SIGGI LEIPOLD, as agent for Armin Hau

SUSAN CAMPBELL, representing the
Board of Trustees under the Travel Industry Act

DATE OF

HEARING: 28 October 1992

Toronto

REASONS FOR DECISION AND ORDER

Armin Hau and Siggi Leipold organized groups for travel through their German Radio Tours contacts and made arrangements through Trans-Globe Travel Ltd. where funds paid for the trips were not forwarded by that travel agency. Four groups of tourists were able to make their trips to Hawaii, South America, Thailand and Egypt when Hau and Leipold arranged mortgages on their homes in order that their clients could complete their vacations.

The respective claims and number of travellers were:

	Persons	Paid by Travel Fund	Balance claimed
Hawaii	30	\$54,651	\$ 3,621
South America	32	47,547	2,077
Thailand	28	45,833	3,804
Egypt	31	12,844	<u>3,441</u>
			\$12,943

The Travel Industry Fund did not pay the claims for travel insurance and airport departure taxes, and the total sought by Armin Hau is \$12,943.00.

In replying to each of these four claims, Nancy Rossi, the Manager-Administration and Claims for the Ontario Travel Industry Compensation Fund wrote:

Your claim was presented to the Board of Trustees of the Ontario Travel Industry Compensation Fund at its meeting which was held on May 26, 1992. At that time it was determined that the claim is not eligible for payment. This letter is notice of that decision.

Section 15(1) of the Travel Industry Act outlines the provision for an eligible consumer claim and states in part:

1. "A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contacted for is entitled to claim for a refund of moneys so paid..."

In 1981 the Commercial Registration Appeal Tribunal determined specific items which were deemed to be a 'travel service'. Taxes and insurance were not among them and are not eligible for reimbursement from the Fund. Hotel taxes are however, claimable when combined in one figure together with hotel service charges. A copy of this decision is enclosed for your reference.

Notwithstanding the above, Section 16(1) of the Regulation and subsequent subsections thereto, entitle you to a hearing by this same Tribunal. To file such an appeal, you must mail or deliver a written request within 15 days of receipt of this notice.

In response to these four decisions, Hau and Leipold wrote with respect to these four trips which were completed:

No-one was able to board the plane without a \$40.00 airport tax paid. Furthermore, all of the vacationers in the groups were between the ages of 50 and 70. Thus, they had to have insurance in order to travel on such exotic trips. This insurance service was also performed.

In conclusion, we expect from you, due to our explanation, the refunding to us of the money that we paid out for the services. Please consider our request at your up-coming Board meeting, where we would like to be present.

These trips were performed by Storm Travel. Also, as was suggested by you, Armin Hau and Siggi Leipold had to refinance all of these four trips and put a security mortgage on their houses. Please accept our explanation and the facts and invite us to the next Board meeting, where this will be discussed. May we also note that the Travel Insurance Fund saved some money from the cancellation of clients repaid by the Insurance firm.

Nancy Rossi reviewed each of the four claim document packages and said that where the total of cost for the trip had been paid by the traveller, the Canadian departure tax and the destination's departure tax and any travel insurance purchased were not refunded by the Fund. Where part payment had been made, only the insurance claim was denied as the departure taxes are considered to be paid out of the final portion of a full payment.

She noted that all these packages received their vacation trips through the personal commitment of Hau and Leipold to satisfy their group members. She said that the refusal to pay these balances was based on a decision of this Tribunal after a hearing in October 1981 in the claim of John B. Battista and 24 others against Strand Holidays Limited. This decision is reported in (1981) 10 CRAT 156.

In each of the claims, departure taxes and travel insurance were not allowed. The Tribunal said at page 162:

'for travel services'

Travel services are defined in section 1 of the Act:

(g) "travel service" means transportation, sleeping accommodation or other service for the use of a traveller, tourist or sightseer;"

The Tribunal is of the opinion that "other service" must be interpreted on the

basis of being a direct element of travel and not an indirect element.

Accordingly, the Tribunal finds:

travel service includes:

- meals arranged for and paid for in advance
- Hotel charges relating to gratuities (services charges)

travel service excludes:

- taxes of all types - port, airport, departure, hotel, etc.
- insurance, however described, relating to cancellation (protection against losses prior to departure) (sometimes referred to as waiver fee) or other insurance, however described, providing protection against accidental death, medical services, loss of baggage, trip interruption, etc.
- Expenses incurred which are not in lieu of travel services contracted for e.g. separate limousine costs
- interest on monies paid for travel services

The Tribunal finds that all the services claimed for are travel services within the meaning of the section, with the exception of those which come within the exclusions referred to above.

In addition, we had referred to us the decision of Lawson McKay Tours where Dorothy Armstrong and 45 others had claims considered and decided upon in March 1982 as reported in (1982) 11 CRAT 212. Again the reference 'for travel services' states:

Travel services are defined in section 1 of the Act:

(g) "travel service" means transportation, sleeping accommodation or other service for the use of a traveller, tourist or

sightseer;"

The Tribunal is of the opinion that "other service" must be interpreted on the basis of being a direct element of travel and not an indirect element.

Accordingly, the Tribunal finds:

"travel service" includes all the items set out in the cost sheets (Exhibits 19 - 33) excluding:

- . taxes of all types - port, airport, departure, hotel, etc.
- . charges for bag, pin, wallet

and "travel services" excludes:

- . cancellation insurance
- . visa fees

The Tribunal is of the opinion that 'travel service' includes 'escort costs' and the term is not restricted by the ejusdem generis rule to matters akin to transportation and sleeping accommodation. A service for the use of a '...tourist or sightseer' can be quite unrelated to the two specifics.

The Tribunal finds that all the services claimed for, with the exception of those which come within the exclusions referred to above, are a travel service within the meaning of the section.

And a third decision of this Tribunal was also cited, namely Jack B. Leue and Dona C. Leue where in that 10-day hearing of a claim which concluded on June 5, 1984, the Tribunal followed the Battista and Armstrong decisions in denying the \$3.00 tax as not being a travel service.

Counsel for the Registrar stated that these three decisions had set the practice of the Travel Compensation Fund for the past ten years in denying claims such as those of Hau and Leipold.

The Tribunal has considered the claims and the pattern of decisions upon which the Compensation Fund relies.

We note that various national governments have substantially increased airport departure taxes from a minimal fee of ten years ago to a substantial revenue producer. Further, if the fee is not paid, the traveller does not travel and we believe that this necessary tax should now be included in the word 'transportation' under the definition of "travel service" as set out in section 1 of the Travel Industry Act, Revised Statutes of Ontario 1990, Chapter T.19, which states:

"travel service" means transportation, sleeping accommodation or other service for the use of a traveller, tourist or sightseer;

Further, travel cancellation insurance is a common and intelligent expenditure for persons of all ages where a sudden health concern could deny the opportunity for a vacation trip. Therefore, we would include such an amount in a reasonable reading of common travel practices by many persons who would include this payment within the term of "other service" as set out in the definition above.

Therefore, we find that it makes good sense to protect consumers in Ontario by having both of these items included in recovery of claims under the Travel Compensation Fund.

Accordingly pursuant to the authority granted to the Commercial Registration Appeal Tribunal under section 16(3) of the Schedule TERMS OF COMPENSATION FUND set out in Ontario Regulation 938 made under the Travel Industry Act, the Tribunal directs the Ontario Travel Industry Compensation Fund to pay to Armin Hau the sum of \$12,943.00 for the recovery of airport departure taxes and travel insurance paid on behalf of his clients.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

FEREYDOON MOJADED-SHAHROOZ

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
GURDIAL SINGH FIJI, Member

APPEARANCES:

FEREYDOON MOJADED-SHAHROOZ, appearing on his own behalf

SUSAN CAMPBELL, counsel representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 21 September 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Fereydoon Mojaded-Shahrooz appeals a decision by the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow his claim for the cost of his return flight from Teheran, which he was required to pay when JAT Yugoslav Airlines failed to provide him the return flight. According to Mr. Mojaded-Shahrooz, this return flight in August 1992 cost him \$5,209.00 in Canadian funds.

In its decision dated December 1, 1992, the Board of Trustees paid Mr. Mojaded-Shahrooz the amount of \$2235.00, leaving a balance of \$2974.00 unpaid and in dispute.

The facts are not in dispute however.

It is agreed that Mr. Mojaded-Shahrooz paid a total of \$4630.00 to an Ontario travel agent in April 1992 to purchase four air-only return tickets, routing being Toronto/Belgrade/Teheran. These tickets were purchased through JAT Yugoslav Airlines.

The evidence is that JAT Yugoslav Airlines lost its landing privileges in Canada in late May 1992.

In early June 1992, according to Mr. Mojaded-Shahrooz's claim form, JAT Yugoslav Airlines provided Mr. Mojaded-Shahrooz his flight to Teheran through British Airways.

However, once in Teheran, Mr. Mojaded-Shahrooz was forced to make alternate travel arrangements because of the failure of JAT Yugoslav Airlines to provide the return flight to Canada. It was agreed that Mr. Mojaded-Shahrooz received no compensation from JAT Yugoslav Airlines to cover the cost of these alternate travel arrangements.

The uncontradicted evidence of Mr. Mojaded-Shahrooz is that he was required to expend the amount of 823 pounds and 1,940,680 in Iranian currency to purchase an equivalent return flight to Canada as scheduled. Mr. Mojaded-Shahrooz thus claims what he believes to be the equivalent in Canadian funds, in the amount of \$5209.00, from the Ontario Travel Compensation Fund.

Mr. Mojaded-Shahrooz argues that this amount of \$5209.00 represents his true loss, occasioned by the inability of JAT Yugoslav Airlines to provide what it had promised him and what he had paid for: a return flight from Teheran in August 1992.

There is no dispute that he did not receive this travel service. He only received half of the travel service for which he contracted and paid, namely the flight from Canada to Teheran.

There is also no dispute that he was required to spend nearly twice the amount he originally bargained for in order to obtain a return flight to Canada from Teheran. Counsel for the Travel Compensation Fund did not challenge what appeared to be the making of reasonable travel arrangements by the Applicant under the difficult circumstances in which he found himself in August 1992.

Mr. Mojaded-Shahrooz's argument is compelling in its plea for fairness. If the only applicable principles in law were those of contract law, this argument would bear more weight.

However, this Tribunal, despite its sympathy for Mr. Mojaded-Shahrooz, is bound to apply the law as set out in the Travel Industry Act. Particular reference is made to part 1 of Section 15(1) of the Schedule to Regulation 1085 to this Act. That law is clear. It states:

A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided.... (Emphasis added).

This Act governs and limits the ability of the Ontario Travel Compensation Fund to compensate members of the travelling

public. One of those limitations applies here to exclude compensation for Mr. Mojaded-Shahrooz for the cost of alternate travel services that he was required to assume when JAT Yugoslav Airlines failed to provide him a return flight to Canada.

Thus, Mr. Mojaded-Shahrooz is entitled to claim only a refund of the money that he paid to the participating Ontario travel agent, being \$4630, for the travel service that he did not receive. He is not entitled to claim a refund of the money that he paid to others, namely British Airways in the amount of \$5209, for the travel service that he did not receive.

What Mr. Mojaded-Shahrooz did not receive was half of the value of the travel service, namely his return flight from Teheran to Canada. Thus, he is entitled to a refund of half of the amount of \$4630 being \$2315 (minus \$80 in taxes, which is non-compensable by the Fund) for a total of \$2235.

In the opinion of this Tribunal, this amount of \$2235, paid by the Ontario Travel Compensation Fund, is the only amount the Fund is entitled under the Act to pay to compensate Mr. Mojaded-Shahrooz for the losses he sustained as a result of the failure of JAT Yugoslav Airlines to provide him a return flight to Canada.

By virtue of the authority vested in it under the Travel Industry Act and regulations thereto, the Tribunal upholds the decision dated December 1, 1992, of the Board of Trustees of the Ontario Travel Compensation Fund to disallow the claim of the Applicant.

ERIK W. SIMMATIS

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
GERRY BEECH, Member

APPEARANCES:

DENNIS SIMMATIS, agent for the Applicant

SUSAN CAMPBELL, representing the Board of Trustees
of the Travel Industry Compensation Fund

DATE OF

HEARING: 29 January 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund at a meeting held on August 25, 1992 which decision was communicated to the Applicant by a letter dated August 31, 1992 from the Manager - Administration and Claims of the Fund. The claim is to recover the sum of \$300 from the Fund. The relevant facts are as follows.

The Applicant and his wife booked a holiday to Panama City in January 1991 through a travel agent, Carousel Holidays. It was a "package tour" for two weeks at a cost of \$2,000. Included in the terms and conditions of the sale of the tour to the Applicant by the travel agent were the following terms:

UNUSED TOUR OR AIR ONLY SERVICES

The purchaser/travellers acknowledge that refunds will not be allowed for any unused tour or air only service. Tickets are non-transferrable and are valid only for the dates and routings shown.

**UTILIZING HOLIDAY ACTIVITIES, FACILITIES,
EQUIPMENT AND SERVICES**

The purchaser and travellers acknowledge that Carousel Holidays does not provide and is not responsible for the provision

of holiday activities, facilities, equipment, and services. Such services are provided by the hotel and/or other independent contractors. The purchaser and travellers utilizing these services acknowledge they are doing so at their own risk. Passengers utilizing the services, facilities and equipment of hotels and elsewhere and who participate in the activities provided agree to sign a Release Form to acknowledge they accept the inherent risks including those of personal injury. Passengers will be required to sign such forms at time of hotel check-in.

.....

Carousel Holidays accepts no responsibility whatsoever for any claim, loss, damage, cost or expense howsoever caused by any person including any agent or independent contractor, and their employees, agents or subcontractors for said alterations. Without limiting the generality of the foregoing, Carousel Holidays does not accept any responsibility whatsoever for any claim, loss, damage, cost, or expense howsoever caused for any illness as a result of food, water and beverages, or any other illness, injury to person or property, delay, anxiety, loss of enjoyment, or inconvenience caused by an independent contractor and its' agents or employees, or subcontractor. All elements and services supplied are subject to the terms and conditions imposed by the independent contractors supplying the services.

The Applicant and his wife proceeded on the tour but, when they had been in Panama City for about one week the Applicant became ill with what was believed to be a contagious disease (apparently some form of viral pneumonia) and the hotel insisted that they leave at once, fearing infection of other persons. The Applicant and his wife had to pay the cost of a separate return flight to Ontario and, of course, lost the remainder of their vacation. The evidence disclosed that the Applicant had difficulties with an insurer, but was able to reach a settlement with the same. We do not have any details of that, but it is really not relevant to the issue we must determine.

The Applicant also pressed a claim against Carousel Holidays. This company took the position that it was not liable to the Applicant in any respect as a result of what had happened, but for the sake of settling the claim, and perhaps also as a goodwill gesture and a step taken to have the Applicant come back to Carousel Holidays for his next vacation, that company offered him a gift certificate in the amount of \$300 valid for two years on any vacation package offered by it. The Applicant accepted this settlement and attempted to use the certificate upon a booking of a trip to Antigua in 1992, but by this time Carousel Holidays had gone out of business and there was no one to honour the certificate. It appears most probable that the certificate was issued in good faith and that Carousel had every intention of honouring it when it was issued but the intervening circumstances rendered it impossible for it to do so and rendered the certificate worthless. It is the \$300 value of this certificate which the Applicant seeks to recover here.

We have the evidence of the Manager of Administration and Claims of the Fund that, at the time it went out of business, there were outstanding a number of similar Certificates, the holders of which have made similar claims upon the Ontario Travel Industry Compensation Fund and further that the Compensation Fund has not paid any of these claims.

In her argument, counsel for the Board of Trustees submitted that the issue is governed by the provisions of Section 15(1)1. and 2. of Ontario Regulation 938 made under the Travel Industry Act which read as follows:

15.-(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of

bankruptcy or insolvency, but a client is not entitled to claim for a refund of any money paid to a participant where the claim has been provided with travel services or alternative travel services and such claim is based on the cost, value or quality of the travel services provided.

2. No client shall have a claim for the refund of any money paid by the client to a participant where the client was informed prior to the making of the payment to the participant that the money paid was a non-refundable deposit or a reasonable service charge.

In his argument, the agent appearing for the Applicant argued that the Applicant did not get the travel services for which he paid, he had a claim for the same which he settled for a \$300 certificate and when it became worthless because of the failure of Carousel, he is entitled to this sum from the fund. He argued that the Applicant would have sued Carousel if it had remained in business and, therefore, should be able to recover this sum from the Fund.

The Tribunal is inclined to agree with the Applicant that he could recover the \$300 from the fund if he could have succeeded in an action at law against Carousel. However, it is our view that he would not have succeeded in such an action unless Carousel had some liability to the Applicant in respect of the claim which he made against it. The certificate was issued without consideration and provided no covenant or term upon which a successful action in contract could be brought. The terms and conditions of the contract quoted above apply clearly to the circumstances of this contract, and therefore the claim does not come within what is covered by Section 15(1) as set out above.

Accordingly pursuant to the authority vested in it by Section 16(3) of Ontario Regulation 938 made under Section 27 of the Travel Industry Act, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow this claim.

S. SITTAMBALAM

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
JUDITH A. KILLORAN, Chair as Member

APPEARANCES:

S. SITTAMBALAM, appearing on his own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 17 November 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter to the Applicant dated June 30, 1993. The relevant facts established at this hearing are as follows:

For a period of time, a company, Interface A Meeting of Cultures Ltd., which was registered as a travel agent under the Travel Industry Act of Ontario had organized and operated what it called travel programs for students in Canada and the United States. In an informational and instructional piece headed "Policy and Procedures for 1993 Programs" which forms part of document 4 in Exhibit 5, it is stated that it was in its 16th year of doing this. On April 24, 1992, a letter was sent from St. Clement's School in Toronto to the parents of students who would be in grade 7 in the forthcoming school year announcing plans for these students to visit Ottawa in April 1993 with Interface Tours. The letter went on to say,

For many years now, our students have enjoyed and benefitted from programmes organized by Interface. The Ottawa trip should provide an excellent opportunity for the students to gain insight into the history of our capital city.

The cost of the trip will be \$239 if a spring deposit of \$100.00 is received by

15 June 1992, otherwise the fall price will be \$269.00. This represents a saving of \$30.00. Attached is a brochure and a form outlining the payment schedule. If your daughter has your permission to go on the Ottawa trip, please return the signed permission form together with a cheque to Mrs. Clay no later than 24 May 1992. The cheque should be made payable to Interface in the amount of \$100.00 and should be dated 15 June 1992. In order to ensure our group reservation, we require your deposit.

We do hope that your daughter will participate in this trip.

The "signed permission form" to which reference is made was in fact a part of a six part (both sides of a sheet folded into three) brochure, a copy of which is next as part of the said document 4. A copy of this letter was brought to the Applicant and it was decided that his daughter would go on the trip. The Applicant did not remember the brochure, but there is a reasonable inference that he had it because the plans went forward for her to go and this would not have happened without the parent's consent on the form and the student application form which was on the reverse side of the same fold of the brochure.

On two other parts of the brochure were set out the terms and conditions of the costs of the expedition. These figures are based on a full bus and a distinction is made between those paying a Spring deposit (\$239) and those paying a Fall deposit (\$269). Under this, there is a breakdown of the total cost under two headings - first being Course Enrollment and second being Travel and Accommodation. Course enrollment is stated to include:

- .Academic Instruction (Please refer to schedule)
- .Educational Performances
- .Administration

A "CANCELLATION POLICY FOR COURSE ENROLLMENT FEE" is stated to be:

Please Note: The enrollment fee is fully refundable for any reason up to October 1st, 1991. After that a refund less a twenty-five dollar handling charge will be issued only upon presentation of a medical certificate.

Under this is provision for "PAYMENT MODE" which is set out as follows:

SPRING	FALL
ENROLLMENT	ENROLLMENT
\$100.00	\$100.00
(by June 15th)	(by Sept.30th)

All Cheques and Money Orders are to be made payable to: INTERFACE TOURS and must have students name, school name, destination and departure date on back.

It would appear that this brochure was designed generally to be used for all trips or programs during the period and adapted to each particular one so that the form provided for a means of differentiating between a Spring and a Fall enrollment fee although in this case this was not necessary as they were the same.

On the other side, "TRAVEL AND ACCOMMODATION" is stated to include:

- .Transportation from your school to Ottawa (return)
- .2 NIGHTS ACCOMMODATION (Students billeted 4 per room)
- .2 Breakfasts
- .2 Dinners
- .Tours
- .All Gratuities
- .Cancellation Insurance

A "CANCELLATION POLICY FOR TRAVEL AND ACCOMMODATION FEES" is stated to be:

Please Note: Cancellation in writing up to 45 days prior to departure for any reason whatsoever - full refund of travel and accommodation fees. Cancellation from 45 days up to departure date, no refunds of monies paid without medical certificate. Office must be notified prior to departure.

(NOTE: Course Enrollment Cancellation Policy Differs);

and on the other side a "PAYMENT MODE" is set out:

	SPRING ENROLLMENT	FALL ENROLLMENT
Cost of Travel	\$129.91	\$157.91
GST @ 7%	9.09	<u>11.06</u>
Total cost of travel	\$139.00	\$169.00
Payment By November 1	\$100.00	\$100.00
Balance due		
45 days Prior	\$ 39.00	\$ 69.00

At the bottom of this side is found, in bold print, the words:

THE ABOVE PRICES INCLUDE
ALL TAXES AND SERVICE CHARGES

At the bottom of the part with the application form is listed the total cost to the Program based on a full bus with a Spring deposit and with a Fall deposit and under this is found words which may be important:

Program includes: Transportation,
Accommodation, Breakfast, Dinners,
Instruction, as per attached Curriculum,
Gratuities and Cancellation Insurance.
All Taxes and Service Charges.

No evidence was presented at the hearing as to there being any attached curriculum concerning instructions.

The Applicant completed the necessary documents to have his daughter go on this program and sent these to the school together with a cheque for \$100.00 payable to Interface. He later sent a second cheque for \$100.00 for the second payment. A copy of the face of both cheques are found in document #2 of Exhibit 5, and a copy of both sides of these cheques forms the last sheet of Exhibit 2. It is to be noted that this cheque was originally dated May 25 and this was changed to June 15 (being the date the letter of April 24 instructed it to be dated). This would indicate that the maker of the cheque (the Applicant) originally made it out on May 25 and then saw the instruction about the date and changed it. There is nothing in the brochure to indicate this instruction, so the Applicant must have been following the letter and not the brochure for his instructions.

The next document which forms part of document #4 in Exhibit 5 is a 3-sheet undated document headed "Policy and Procedures for 1993 Programmes" to which we referred above. The Applicant's evidence was that he saw a copy of this document for the first time at this hearing and there is no evidence before us to contradict this or lead us to draw an inference to the contrary.

Counsel for the Respondent drew our attention to the following passages from this document:

Interface programmes are recognized by school boards, teachers and students as being of the highest calibre combining academic instruction, physical activity and bi-cultural experiences.

Interface requests that teachers accompany their students to all activities and that students and teachers attend classes on time.

- E. In the past, some schools have remitted payments on a school cheque. Under the regulations of the Ontario Travel Industry Act, the cheque for the Course Enrolment Fee (deposit) must be issued by the individual parent or guardian to INTERFACE, and the cheque for the Travel and Accommodation Fee must be issued by the parent or guardian to INTERFACE TOURS, to ensure coverage under the compensation fund.
- On the reverse of each cheque Interface requires the following information.

1. Name of Student
2. The School Name
3. The Date of Programme Departure
4. Destination

Next in Exhibit 5 is document 5, a copy of a computer printout generated by Interface and provided to the school involved. This document shows the names of students signed up for the trip, including the Applicant's daughter, a sum by way of an enrollment fee, in all cases \$100.00, a sum for travel services, either \$144.86 or \$172.90, presumably less for those paying a Spring deposit, followed by columns showing the amounts paid. In the Applicant's daughter's case, it shows \$100.00 paid for the enrollment fee, \$100.00 paid for travel costs and \$55.00 paid later to cover the balance. The evidence was that this last sum was paid

for all students by the school and charged by it to their own accounts.

The last sheet of Exhibit 2 is a copy of both sides of the two cheques as aforementioned. It is to be noted that both are made out to "Interface" although the instructions provided to the Applicant are not consistent. In the letter of April 24, 1992 from the school, it is said cheques should be made out to "Interface". At the bottom of the first side of the brochure it is stated "Cheques and money orders are to be made payable to 'Interface Tours'", and in paragraph E of the "Policy and Procedures" information sheet, instructions are given that the cheques for the deposits or enrollment fees should be made payable to "Interface" and cheques for the travel and accommodation should be made payable to "Interface Tours". We have noted these facts because a critical question in the case is the nature and effect of the distinction made between the fee paid for these two stated purposes.

The tour was scheduled to depart from Toronto to Ottawa on May 10, 1993 and return on May 12. However, Interface A Meeting of Cultures Ltd. became bankrupt on May 7, 1993 and the tour was cancelled and when the Applicant sought a refund of his \$200.00, he was advised it had no funds for this purpose. He then made a claim upon the Travel Compensation Fund which led to the decision of the Board of Trustees from which this appeal is taken.

In his evidence, the Applicant said that he understood that the total price paid for the total package tour, although in cross-examination he said that he did understand there would be an educational component in the tour. He said that he did not remember reading the brochure, but that he may have had it. For reasons stated above, the Tribunal has drawn the inference that he did have it. His evidence was clear that he did not see the other three pages of the Policy and Procedures document.

For the respondent, evidence was given by Nancy Rossi, its Manager - Administration and Claims. She stressed the distinction made in the document provided by Interface between the course enrollment provisions and the travel and accommodation provisions. She said this same distinction appeared in the vast majority of what is a large number of claims made upon the Fund resulting from the bankruptcy of Interface and all have been treated the same way by the Board of Trustees.

In its decision, the Board quotes section 15(1) of the Schedule to Regulation 1085 enacted under the Travel Industry Act which reads in part:

15.—(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency.

The Board then goes on to give its decision:

The Board has determined that \$100.00 is eligible for reimbursement from the Fund and a cheque in this amount is enclosed. However, the Board has found that the payment of an enrollment fee does not constitute a payment for travel services. Therefore the \$100.00 enrollment fee included in your claim has not been reimbursed.

What the Tribunal must determine is whether the proper application of the relevant Regulations to the facts established at this hearing should lead to the result reached by the Board of Trustees or not.

Counsel referred us to three earlier decisions of the Tribunal. In the case of John P. Battista and others (1981) 10 CRAT 156, the Tribunal examines the meaning to be attached to each part of this Regulation. There is no question that Mr. Sittambalam was a "a client", that Interface was "a participant", that the payment was made, that the consideration for the payment was not received or provided and that Interface has refused without legal justification to make a refund or is unable to do so because of its bankruptcy. The only question is whether the consideration for which the \$100.00 being claimed in this hearing was paid was "for travel services" within the definition thereof.

Travel services are defined in section 1 of the Act as being:

"travel service" means transportation, sleeping accommodation or other service for the use of a traveller, tourist or sightseer;

In the Battista case, the Tribunal (near the bottom of page 162), says that it is of the view that "other service" must be interpreted on the basis of being a direct element of travel and not an indirect element. It went on to say that the term would not

include taxes of all kinds, insurance, including cancellation insurance and insurance for death, injury or property loss, services not in lieu of travel services contracted or interest on money for travel services.

In the case of Dorothy Armstrong and others (1982) 11 CRAT 212, the same issues are discussed. The definition is quoted at p.226 and the Tribunal goes on to say that taxes, charges for a bag, or a pin, or a wallet, or cancellation insurance or visa fees are also excluded. In the judgement, the Tribunal says:

...The Tribunal is of the opinion that 'travel service' includes 'escort costs' and the term is not restricted by the ejusdem generis rule to matters akin to transportation and sleeping accommodation. A service for the use of a '...tourist or sightseer' can be quite unrelated to the two specifics.

In both the Battista and Armstrong cases, the Tribunal finds that all services claimed except those which come within the exclusions are travel services within the meaning of the sections.

Finally in the Leue case (1984) 13 CRAT 305, the Tribunal dealt with a point quite similar to the issue we have here. It deals with a list of items in dispute as to whether they come within the definition of a "travel service" and at p.318, the Tribunal says:

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal is of the opinion that:

(a) Registration (tuition) fee in respect of direct educational aspect of a trip which are related to a vocation, profession, etc. is not a travel service; [any sum so claimed should be deducted from the amount claimed].

These cases give support to the position of the Respondent.

In this case, the Tribunal has reached a conclusion, with some reluctance, that the Applicant is not entitled to succeed with this appeal. We say with some reluctance for two reasons. First because we have some sympathy for the Applicant because we believe his understanding of the whole transaction is one which most people would have if they do not read and consider the detailed

information with some care and secondly, because this is a decision which we must make on the evidence before us at this hearing, having in mind a number of questions, the answers to which might have thrown some different light upon the matter.

It would have been of value to know:

1. Why Interface divided the package into the two component parts?
2. Upon what amount the fee paid by Interface into the Compensation Fund for these bookings was based?
3. How the differential between a Spring and Fall booking was allocated between the two components in each case when the fee for the course enrollment was treated as being the same in both instances (one would have thought that the cost of transportation, accommodation, meals and tours about Ottawa would have been the same for everyone on the bus whether they had booked the previous Spring or Fall).

However, the onus of proving his case or establishing his claim both to the Board of Trustees and before this Tribunal rests upon Mr. Sittambalam. If the answers to these and perhaps other questions would have helped, which we cannot tell without knowing what they were, it was his responsibility to obtain these for us. Upon the evidence, we have to agree that the Applicant has not established that the \$100.00 in dispute was paid for a travel service.

Therefore, by virtue of the provisions of section 17(3) of the Schedule "Terms of Compensation Fund" attached to Ontario Regulation 1085 enacted under the Travel Industry Act, the Tribunal directs the Trustees to refuse to allow this claim.

MARNIE TOBEN
(TALK OF THE TOWN TRAVEL LTD.)

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
PETER BONCH, Member

APPEARANCES:
MARNIE TOBEN, appearing on her own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF 15 September;
HEARING: 21 October 1993 Toronto

REASONS FOR DECISION AND ORDER

This is a appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund which was delivered to the Applicant by way of a letter dated August 31, 1992. The Board denied a claim in the sum of \$699.00 which had been made upon the Compensation Fund by the Applicant. The relevant facts of the matter are as follows.

The Applicant has been a registered travel agent since 1980 and still holds that registration. For a number of years, and at all times material to this matter she had an arrangement with a company which was also a registered travel agent, whereby she could find travel customers for that company and it would pay her certain commissions for doing this. A document, Exhibit 7, was filed which shows a running account kept for her by this agent, Talk of the Town Travel Ltd. in which commissions coming due to her were listed. From time to time monies would be paid to her from this account and items owing by her to Talk of the Town Travel Ltd. would be charged to it.

It appears from the evidence that shortly before September 30, 1991, a registered travel wholesaler, Discovery Tours, offered what is known in the industry as a familiarisation tour for travel agents to Spain and Portugal. The Applicant was interested in going on this tour and had a discussion about it with the principal in Talk of the Town Travel Ltd. At that time, it was decided that

Talk of the Town Travel Ltd. would forward to Discovery Tours a cheque for \$699.00, being the cost of this tour, in order to reserve a place on it. In fact, on September 30, 1991, a cheque was issued by that company for \$699.00 payable to Discovery Tours which cheque appears to have been deposited in the payee's account shortly thereafter, the evidence indicating this was done on October 8.

It is agreed on behalf of the respondent that this sum was the correct amount to cover this tour and there is written on the face of the cheque in the same handwriting as the rest of it the words "re FAM trip to Portugal and Spain". No document was produced showing the Applicant as being the person intended to travel on this trip.

On December 14, 1991, Discovery Tours apparently in financial difficulty, ceased carrying on business and this tour was cancelled and no money remained in Discovery Tours hands to reimburse the \$699.00. On January 8, 1992, the Applicant submitted a claim upon the Compensation Fund for the \$699.00 in which she certified that she had paid this sum to the defaulting participant in the fund, Discovery Tours, and sought its recovery from the fund. She signed this form under the certification, "I hereby certify that the information given in this claim and all documents accompanying the claim is true, correct and complete in every respect." Accompanying this claim form was an Affidavit sworn by the Applicant which stated in paragraph 3 thereof that the payment to Discovery Tours had been made by way of a cheque from Talk of the Town Travel Ltd. (which appears from the foregoing to be correct) and in paragraph 4 thereof that she, the Applicant, had on the same day, September 30, 1991 paid the total sum in cash to Talk of the Town Travel Ltd. (which information which later came to light showed not to be correct).

At this hearing, the Applicant swore that the correct facts were that she had not paid Talk of the Town Travel Ltd. the \$699.00 in cash, but that later on it had been deducted by that company from monies owing by it to her for commissions. Indeed, she said that when it sent in the cheque on September 30, 1991, the question was still open between it and herself as to which one would bear the cost and this was not decided by them until much later. We do not have precise evidence as to when this decision was purportedly made, but the evidence is that the deduction of the \$699.00 for this item from her account with the company was in June 1992. There is some suggestion and a fair inference from the evidence that the decision to do this would have been taken not long before that date and, therefore, a considerable period of time after the default of Discovery Tours and indeed also after the filing of the claim on January 8, 1992.

Upon the evidence provided to us, there is also doubt as to who was originally supposed to be the beneficiary of this payment. Following the failure of Discovery Tours, investigators on behalf of the respondent reviewed its books and records and following the receipt of this claim reviewed what light these books and records could shed upon it. These records confirm that the \$699.00 had been received, but there was no record whatever of any booking on the tour for the Applicant. There were records of other persons whose bookings were cancelled when the tour was cancelled. Furthermore, we had no evidence from anyone on behalf of Talk of the Town Travel Ltd., not even a letter let alone a witness to corroborate any part of the Applicant's evidence or explain its role in the transaction. All of this is strange and constitutes a situation in which the Tribunal cannot find the necessary facts required upon which to base the Applicant's claim.

To succeed she must bring herself within clause 1 of Section 15(1) of the Schedule under the heading "Terms of Compensation Fund" attached to Ontario Regulation 1085 made pursuant to the Travel Industry Act which reads, in part:

15.—(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency

It is clear that a person who is a registered travel agent can, in appropriate circumstances, be a client within the meaning of this Section if such person is a party to a transaction with a participant in the fund which gives rise to a claim against the fund in the same way as anyone else who is not a registered travel agent can do.

It appeared from the evidence given on behalf of the respondent that the Board of Trustees allows such claims where it believes them proper and it also appeared from that evidence that a number of claims have been allowed to other parties as the result of the default of Discovery Tours. The difficulty faced by this Applicant here is that she, having the onus of proving her claim, has not established the facts necessary to support it.

Her credibility has to be open to some question, having initially certified and sworn to critical statements later admitted and proved not to be true. In such circumstances, we must look

carefully for whatever corroboration can be found for the second set of facts upon which we are asked to allow her claim. This is notably absent and particularly corroboration from Talk of the Town Travel Ltd.

Even if the Tribunal were able to accept the second version of the facts without reservation, it is our view that these would not result in her success with this claim. As between her and Talk of the Town Travel Ltd., it was not determined which should bear the cost of this trip until a date when the only value left in the transaction for them was whatever right there might be to recover the \$699.00 from the Compensation Fund and undoubtedly both of them knew this. If at that time, Talk of the Town Travel Ltd., which had made the payment to Discovery Tours on September 31, 1991, had made the claim, as client, within the section and shown that it had paid for the trip for the familiarisation of one of its people, it might well have succeeded. This second version of the facts do not bring the Applicant within the provisions of Section 15(1)(1.) of the Schedule of the Regulations aforementioned.

Therefore, pursuant to the authority vested in it by Section 17(3) of the said Schedule to the Regulations, the Tribunal directs the Trustee to disallow this claim.

DWYER FUNERAL HOME

APPEAL FROM A DECISION OF THE
COMPLAINTS COMMITTEE OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
GERRY BEECH, Member
WILLIAM HASKETT, Member

APPEARANCES:

WAYNE R. RICHARD, representing the Applicant

DONALD POSLUNS, representing the Board of
Funeral Services

DATE OF

HEARING: 14 May 1993

Toronto

REASONS FOR RULING

This is a hearing before the Commercial Registration Appeal Tribunal pursuant to the provisions of Section 14(6) of the Funeral Directors and Establishments Act. The hearing resulted from the following circumstances. A consumer, one Mrs. Fay Newton, had contracted for the services of Dwyer Funeral Home in Hamilton for the funeral of her father. The licensed funeral director of that establishment with whom she dealt was Mr. Joseph Tingle.

After the funeral, Mrs. Newton sent a letter of complaint to the office of the Registrar of the Board of Funeral Services complaining of the conduct of Mr. Tingle. The Registrar's office dealt with this complaint in accordance with the procedure prescribed in Section 14 of the Act. A copy of the complaint was sent to the person complained against, Mr. Tingle, as required, and he responded in writing.

An investigator in the office of the Registrar, Sheila Nunn, made certain investigations of the matter and prepared a report based upon these. She then forwarded to the Complaints Committee established under Section 7(1) clause 3 and Section 10 of the Act, a copy of the original complaint, a copy of the response of the person complained against and a copy of the report which she had prepared as aforementioned. The Complaints Committee held no hearing (subsection (5) of Section 14 specifically states that it is not required to hold a hearing or afford any person an opportunity of appearing before it) but proceeded to issue a decision based upon the material which it had. It did not go so far as to direct that the matter be referred to the Discipline Committee pursuant to subsection (2), clause (b) of Section 14,

but it did issue a reprimand of Mr. Tingle censoring some of his conduct which had been the basis of the original complaints against him.

Upon receiving a copy of this decision, both Mr. Tingle and his employer Dwyer Funeral Home took issue with these findings of the Complaints Committee and took the necessary steps to avail themselves of the hearing provided in subsection (6) of Section 14 before this Tribunal.

When the matter came on for hearing before us, Mr. Tingle and the owner of Dwyer Funeral Home appeared with counsel, as the party requiring a hearing stipulated in subsection (11) of Section 14, and the Registrar was represented by counsel. The original complainant Mrs. Newton did not attend and was not represented. Before the hearing commenced, counsel for the Registrar raised the question with the Tribunal of the status of the Registrar at this hearing stating that the situation we had before us was unusual in respect that the complainant who had initiated the whole process and whose complaint had resulted in the action being taken upon it as set out above was not present and would be taking no part in these proceedings. He said that the Registrar was prepared to take a position at the hearing and he sought some direction from the Tribunal as to what was the proper status of his client. Since subsection (11) of Section 14 specifically provides that the Registrar is a party to proceedings before the Tribunal under this Section, the Tribunal was of the view that counsel for the Registrar should take part in the hearing as representing a party to the proceedings and, of course, do so as instructed by his client.

At this point, and before commencing upon the hearing itself, the Tribunal raised with both counsel the question of which of the opposing parties before it had the onus of proof and therefore which party should go first in presenting its case. Neither counsel made any submissions on this point at that time and they agreed that counsel for the party complained against, Mr. Tingle would go first and the hearing proceeded and all of the evidence was presented following that order of proceedings.

However, when time was reached to hear the submissions of counsel by way of argument, counsel for the party complained against brought a motion for a direction that the onus of proof at this hearing rests upon the Registrar and therefore counsel for the Registrar should present his argument first. Counsel for the Registrar vigorously opposed this position and both counsel sought the opportunity of looking further into this question and making written submissions to the Tribunal upon this issue. The hearing was adjourned at that point.

Written submissions have been received from both counsel and the Tribunal will now render its decision upon the motion.

The narrow issue to be determined upon this motion is the following - When a "person complained against" receives a copy of a Proposal pursuant to Section 14(6) of the Act and requires a hearing as provided in that subsection and the hearing proceeds before the Tribunal as provided in subsection (8), upon which party at the hearing does the burden of proof lie?

The parties to the hearing are fixed by subsection (11), being the Registrar, the person who requested the hearing (in this case "The person complained against") and such other persons as the Tribunal may specify. No additional parties were specified in this case and so we have just these two parties. On the face of the proceedings before us, Mr. Tingle, the person complained against, is the party who brought on or "required" the hearing and the Registrar is the respondent.

Subsection (6) requires the Registrar to send a copy of the Proposal of the Complaints Committee to "the complainant" and to "the person complained of", and either party has the right to require a hearing before the Tribunal.

In cases where the original complainant has reason to take issue with the Proposal, the issue which we have here either will not arise at all or will arise in quite a different way. A nice question arises at the outset as to whether, under the scheme of this Act as set out in Section 16, the answer can or should be different in determining this issue, depending upon which of those two parties requires the hearing.

The crux of the case for the applicant may be stated as follows. Two principles of natural justice which can only be overwritten by legislation in the clearest and strongest of terms (and perhaps now under the Charter not even then) are that

- 1) a person against whom action is to be taken affecting his rights or privileges is to have notice of the intended action, and
- 2) if he so desires, such person is entitled to a proper hearing at which he can confront his accuser, present his side of the case, and receive a decision from an impartial person or persons.

These principles are the underpinning of the Judgement of Henry J. in Dabor Motors Ltd. et al. and MacCormac et al decided in the Divisional Court on October 28, 1974 and reported in (1974) 5 O.R. (2d) p.473.

In this case, proceedings were initiated by the complaint of a consumer, Mrs. Newton who wrote to the office of the Registrar. As mandated by Section 14(1), the Complaints Committee proceeded to deal with the complaints. It did not hold a hearing of any kind, but had an investigation conducted by the Investigator Sheila Nunn who simply got the written responses of Mr. Tingle, of Dwyer Funeral Home, spoke to four persons of whom she was aware who could throw some light on the matter and made a written report of her findings to the Committee. On the basis of this report, the Complaints Committee reached its conclusions which did not go so far as recommending the matter be referred to the Discipline Committee, but were adverse to the applicant and did admonish him for lack of professionalism. The applicant, asserting that these conclusions are unfounded and unfair to him, seeks redress from this Tribunal. This is the first hearing of the matter as required by the principle aforementioned in the decision of Henry J. It is the case of the applicant that it would be completely contrary to this clear and fundamental principal of natural justice for someone to be able to launch a complaint against him, for the Complaints Committee to be able to make findings against him based on it without his having any hearing at which he could confront his accusers and present his side of the case and then, when he avails himself of the right to a hearing given at this stage to have the onus of proving his innocence rather than someone having the onus of proving the case alleged against him.

The crux of the case for the respondent is that the function of the Complaints Committee is different from any function of the various Registrars under the other Statutes pursuant to which this Tribunal hears appeals or holds hearings. If the Complaints Committee decides to refer a complaint to the Discipline Committee, which alone has the power to recommend disciplinary action (revocation or suspension of licenses or restrictions or terms of conditions upon licences or the imposition of a fine), then the same practices and procedures before this Tribunal prevail as they do under all the other Statutes aforementioned. However, if it does not send the matter to the Discipline Committee (which it did not do in this case), we are dealing with a procedure which was not found under any of the other Acts.

It is the submission on behalf of the Registrar that there are two issues on the motion.

- 1) Is it the Tribunal's mandate to review the decision to determine whether there are grounds to interfere with it or to make its own independent consideration of the complaint?
- 2) Upon which party lies the onus - does the Registrar have to prove Mrs. Newton's

complaint or must Mr. Tingle prove that the Tribunal should interfere with the decision?

It is a further submission on behalf of the Registrar that the Tribunal's function is to review the decision and not to re-examine the complaint and make a "fresh" decision.

The provisions of Section 14(9) of the Act appear to dispose of part of this submission. The Tribunal may, and in cases it considers appropriate should, substitute its opinion for that of the Complaints Committee. The correct answer to the first issue set out by Mr. Posluns appears to be that the Tribunal's mandate can cover both of the alternatives put. It can and should review the decision to determine whether there are grounds to interfere with it and, if it concludes that there are, it should determine what it believes the decision should have been and, in effect, makes a "fresh" decision.

There are three arguments advanced in support of the Registrar's position.

a) The scheme established in the Act differs from those in other regulatory legislation in that it provides for a Complaints Committee. The Committee's role in the scheme must be recognized.

With this submission the Tribunal agrees. In agreeing that the Committee's role in the scheme must be recognized, the Tribunal must, however, go further and consider just what that role is. In paragraph 11 of his written submissions, counsel for the Registrar concedes that this is the first opportunity given the "party complained against" to respond to the allegations against him. In considering the scheme of the Act and the role given the Complaints Committee, it would appear that this Committee was established to deal, in first instance with complaints received by a quite summary procedure and separate those it considered of insufficient consequence to go forward for a disciplinary hearing from those in which their appear to be a prima facie case for such a hearing. This appears to be a very laudable objective which will save considerable time and money by not having the complainant proceed further in the system. If this were the only function of the Complaints Committee, one would not have expected any provision for an appeal by the "party complained against", although a complainant might well be provided with an appeal from a decision not to proceed with his or her complaint.

However, the Complaints Committee has a function in addition simply to deciding whether a complaint should go forward to the Discipline Committee. Section 14(2)(c) provides that it may "take or recommend such action that it considers appropriate in the circumstances that is not inconsistent with this Act, the

regulations or the by-laws." It was pursuant to this authority that the Committee issued its recommendations which, in effect, censored the Applicant and it is from this that he appeals or seeks this hearing.

b) The authority granted to the Tribunal is similar to that granted to appellate courts.

This is clearly not so as a general statement or proposition as it applies to hearings under the other regulatory statutes or to a hearing under Section 18 of this Act following a decision of the Discipline Committee. The question is whether the hearing under Section 14(6) is different in this respect. It is submitted on behalf of the Registrar that the decisions of the Divisional Court and of the Ontario Court of Appeal in Re: Singh v. College of Nurses of Ontario (1981) 33 O.R. (2d) (1992) Divisional Court per Reid J. at p.93 and Re: College of Physicians and Surgeons of Ontario and K (1987), 59 O.R. (2d) p.2 (C.A.) at 19-20 preclude the Tribunal from going so far as retrying the case decided by the Committee. These submissions are not persuasive because the crux of the complaint of the Applicant against the Committee is not that it came to a wrong conclusion after following an acceptable procedure, but that in reaching its conclusions without a hearing, it followed a procedure which, although established in the legislation, should not be taken to abrogate his rights any further than clearly stipulated and, therefore, not so far as to limit his right to appeal therefrom in the manner sought.

c) The onus lies on Mr. Tingle as the party requesting the hearing, to demonstrate to the Tribunal that it should interfere with the decision of the Committee.

This is simply the statement of the ordinary onus in civil proceedings placing an onus of proof on a balance of probabilities upon a party who makes an assertion or brings forward an issue for determination.

Having considered all of the foregoing, the Tribunal has reached the conclusion that the onus of proof should rest upon the Registrar, that the existence and role of the Complaints Committee under this Statute are things not found under any of the other regulatory Statutes with which the Tribunal deals and that the Complaints Committee is, in this respect different. The provisions of the Statute establishing the same do not go so far as to abrogate the fundamental rights of the Applicant in accordance with natural justice to a hearing of first instance at which the party making allegations against him has the onus proving those allegations. We referred above to the consideration that, even if the legislation did go so far, it might be found to be ultra vires as contravening the Canadian Charter of Rights and Freedoms

particularly because it would require a party facing "charges" to come before the hearing of first instance with a presumption of guilt upon him rather than with a presumption of innocence as mandated by the Charter. These questions were not raised before us and, indeed, in view of our conclusion that the legislation does not go this far, it is not necessary to deal with this issue here.

The Tribunal wishes to thank both counsel for the assistance it received from them in dealing with this issue which appears to have arisen for the first time on this motion.

The hearing will now proceed upon a date to be fixed by the Registrar of this Tribunal and the Tribunal will hear the arguments of both counsel beginning with that to be presented by counsel for the Registrar.

SCOTT FUNERAL HOMES
(VAUGHAN CHAPEL)

APPEAL FROM A DECISION OF THE
COMPLAINTS COMMITTEE OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
LYNNE LEE, Member

APPEARANCES:

KENNETH T. ROSENBERG and LILY HARMER,
- representing Scott Funeral

RICHARD STEINECKE - representing the Board of
Funeral Services

DATE OF

HEARING: 5, 13 November 1992

Toronto

REASONS FOR RULING

Upon motion by counsel for the Applicant to prohibit the calling as witnesses in these proceedings the Registrar, Ms. Reynolds and the Chairman of the Board of Funeral Services, Mr. Doyle and upon hearing counsel for the Applicant and the Registrar the following constitutes the decision and reasons therefor.

Counsel for the Applicant submitted that Mr. Doyle should not be permitted to give evidence inasmuch as he is Chairman of the Board of Funeral Services and the Registrar being the Registrar of the Board and having made a decision, being an administrative Tribunal, is now functus and cannot be required to give explanation and comment upon the decision reached by the Registrar. Counsel for the Applicant also submitted that the Registrar having issued her Proposal cannot testify in regard thereto based upon the analogy to judicial decisions and cases dealing with administrative Tribunal decisions.

Counsel for the Registrar submitted to the Tribunal that the Registrar is acting in an administrative capacity not a judicial one and that the notification to the Applicant is a proposal not a decision. Counsel also submitted that the Registrar does not conduct a hearing and, therefore, no final hearing or decision has been made, that the proceedings before this Tribunal are referred to as a hearing not an appeal, and that the Registrar by section 22(7) of the Act is designated a party to the proceedings before this Tribunal.

In considering the motion, the Tribunal has examined the provisions of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, chapter M.21 and in particular section 11 of that Act. Subsection (1) of that section provides for an appeal of the decision of the Tribunal to the Divisional Court. Subsection (5) of that section indicates that the appeal may be on the basis of law or fact, and provides that the Court may substitute its opinion for that of the Registrar or the Tribunal, or the Court may refer the matter back to the Tribunal for a rehearing. This section clearly indicates that a decision of the Tribunal is by way of appeal, but the provisions of subsection (5) indicate that the matter before the Tribunal is in the nature of a hearing, and the reference to returning the matter to the Tribunal for a rehearing does not include a return of the matter to the Registrar.

The Tribunal has also considered the provisions of the Statutory Powers Procedure Act being R.S.O. 1990, chapter S.22. It is to be noted that section 12 of that Act permits a Tribunal to require any person including a party to be summoned before the Tribunal and to give evidence on oath at a hearing. Section 22(7) of the Funeral Directors and Establishments Act designates the Registrar a party to the proceedings, and it is the view of this Tribunal that if a person can be summoned to give evidence, it would follow that a person may voluntarily give evidence.

While that would apply to most hearings, it is important to examine the definitions contained in section 1 of the Statutory Powers Procedure Act. In particular, it should be noted that a tribunal includes one or more persons upon which a statutory power of decision is conferred by or under a statute. The definition in the Act of statutory power of decision means the power or right conferred by or under a statute to make a decision deciding or prescribing :

1.(d)...

(ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not;

Since a tribunal can consist of one person, it is important for the Commercial Registration Appeal Tribunal to consider whether the Registrar has had conferred upon her the right to make a decision.

In this regard, we have examined carefully the provisions of the Funeral Directors and Establishments Act. We note that there are specific sections dealing with certain Committees:

section 13, the Licensing Committee; section 14, the Complaints Committee; and sections 15 and 16, the Discipline Committee.

It is very important to note that with respect to the Discipline Committee, proceedings before that Committee are detailed in section 17 of the Act and it is provided under section 18 that there can be an appeal to the Commercial Registration Appeal Tribunal from a decision of the Discipline Committee. In the view of this Tribunal, clearly a decision of the Discipline Committee would be a Tribunal decision. It is also important to note that the words in section 18 of the Act provide that:

(1) A party to proceedings before the Discipline Committee may appeal from its decision or order to the Tribunal.

(emphasis added)

With respect to the Complaints Committee, there is provision that the Complaints Committee under section 14(5) need not hold a hearing, but under subsection (6) the Registrar must give notice to the parties concerned advising that they are entitled to a hearing before the Commercial Registration Appeal Tribunal. In the case of the Licensing Committee, the provision of section 13 simply provides that the Committee may make recommendations to the Registrar and there is no provision either for appeal or for the direction of a hearing unless the Registrar issues a Proposal under section 22.

It would appear, therefore, that the Licensing Committee, the Complaints Committee and the Registrar are in a different category from that of the Discipline Committee.

In considering the action of the Registrar in this matter, the Tribunal has looked at section 20 of the Act and notes that an application for licensing of an establishment is made to the Registrar. Under the provisions of subsection (3) of that section, an applicant is entitled to a licence except under certain circumstances enunciated in the subsection. Clause (b) of that subsection provides that a licence can be denied to an applicant who is carrying on activities that are or will be if the applicant is licensed in contravention of the Act or the Regulations. Subsection (5) of that section requires the Registrar to issue a licence provided that the establishment is not disentitled under subsection (3).

Subsection (6) of section 20 provides that the licence is subject to such conditions as may be consented to by the applicant or imposed by the Tribunal or prescribed by the Regulations. It, therefore, is clear that the Registrar does not have a discretion without the consent of the applicant to impose any conditions.

The Registrar may only grant a licence or refuse to grant a licence. This would, therefore, appear to be an administrative function rather than a judicial function.

In considering section 22 of the Act, it is noted that if the Registrar proposes to refuse to issue a licence, the Registrar shall serve notice of the proposal together with written reasons. Under subsection (2), the notice must inform the applicant of the applicant's right to require a hearing and if a hearing is requested, that hearing is not before the Registrar but before the Commercial Registration Appeal Tribunal. Counsel for the Applicant submitted that if no requirement for a hearing is made then the proposal is final and binding. But if one examines the wording in clause (3) of section 22, it should be noted that the provision provides that the Registrar may carry out the Proposal. There is no obligation upon the Registrar to continue to carry out her Proposal and therefore it is difficult to consider this to be a final decision. On the other hand if a requirement for a hearing is made, subsection (4) requires the Tribunal to appoint a time and to hold a hearing. It should be noted that this is the first mandatory hearing provided in respect to licensing matters in the Act. . It is also to be noted that subsection (7) of section 22 makes the Registrar a party to the proceedings. It is the view of this Tribunal, therefore, that the Registrar is not an administrative tribunal under the terms of the Statutory Powers Procedure Act and that the requirement for a hearing in respect to the proposal issued by the Registrar does not constitute an appeal of a decision, but rather is the initiating of a hearing only.

A number of cases were submitted to us for consideration. The first was in the matter of the Architects Act of Alberta and **Sheldon Harvey Chandler and the Alberta Association of Architects**, [1989] 2 S.C.R. 848. This case dealt with the question of whether a decision had been rendered by an administrative tribunal and that the tribunal was now functus. As we have found the Registrar is not an administrative tribunal under the Statutory Powers Procedure Act, this case is not germane to the issue. The other cases submitted to us for consideration dealt with the proposition that a decision having been rendered in a judicial capacity, it was inappropriate to call upon the individual making such judicial decision to explain his reasons. We do not quarrel with this proposition, but again find that the Registrar in this case is not acting in a judicial capacity. In particular, the case of **Re Agnew and Ontario Association of Architects**, 64 O.R. (2d) 8 deals with a decision made by the Experience Requirements Committee of the Ontario Association of Architects, and the Divisional Court in Ontario refused to permit members of that committee to be compelled to give evidence. In our view, this would be analogous to the Discipline Committee provided for under the Funeral Directors and

Establishments Act, but it is inappropriate to deal with the Registrar's Proposal in the same manner.

Accordingly this Tribunal hereby dismisses the motion of the Applicant with respect to the right of the Registrar to give evidence on this hearing.

With respect to the question of calling Mr. Doyle as a witness, if it transpires that the Executive Committee of which he is the chair acted in some judicial fashion then any evidence by him as to that decision would not be permissible based on the authorities cited to us in the course of this motion. On the other hand, it has not been indicated to us on what basis Mr. Doyle is being called as a witness and in our view he would be a competent witness subject to any valid objection being made as to the relevance of any testimony which he might proffer to the Tribunal. Accordingly the motion of the Applicant to prohibit Mr. Doyle from giving evidence on this hearing is likewise dismissed without prejudice to the Applicant to raise objections from time to time during the course of such testimony.

BONIK INCORPORATED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
GORDON R. DRYDEN, Vice-Chairman as Member
D.H. MACFARLANE, Member

APPEARANCES:
JOE ZITO, representing the Applicant
BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 21 June 1993 Toronto

REASONS FOR RULING

At the commencement of this hearing before the Commercial Registration Appeal Tribunal, counsel on behalf of the Ontario New Home Warranty Program brought the attention of the Tribunal by motion to Section 10(1) of Regulation 892/90 which was Regulation 726/80. In that subsection, it states: "Every registration and renewal thereof expires one year after the date as of which it is granted to the registrant" and then in the two subsections thereof, it refers to two points, that the registrant shall apply for renewal of registration not less than 60 days nor more than 90 days before the date of expiry and secondly in subsection (3), that the Applicant shall complete, execute and deliver to the Registrar such form or forms and such other documentation as the Registrar may provide from time to time.

The registration date in this case for Bonik Incorporated is June 8 and it is clear that the onus is on the builder to stay registered. This is a new hearing before the Tribunal and any discussion with respect to registration earlier or the concerns or problems about it is not binding on this panel. We understand that the New Home Warranty Program could cure a registration defect if it chose to do so. Certainly forms can be received and in this instance, a cheque has been received and apparently deposited. However, the New Home Warranty Program does not choose to accept the late registration and fees for a catch-up of the past three years.

Tribunal and are clearly bound by the contents of the Act in this case and the Regulations that are made under it. In looking and considering two Exhibits that are before the Tribunal, we note that in a letter of September 6, 1992, which is Exhibit 16, written on behalf of Bonik Incorporated, the third paragraph is as follows:

Please provide information how I will jeopardize my right to a hearing before the Commercial Appeal Tribunal as I am not fully familiar with the legalities. As you know this issue is handled by the lawyers and probably will be concluded that way.

The response of the Program, which is a letter of September 14, 1992 has been filed as Exhibit 5 and the last paragraph of that letter states:

Finally, the Warranty Program has not been provided with the Application you refer to in your letter of September 6th and will require receipt of a completed Renewal Application together with the remaining outstanding documentation. Should you fail to submit this documentation by September 17, 1992 it will be our position that you will lose your right to a hearing before the Commercial Registration Appeal Tribunal.

In the view of this panel and since the Cyril Barrette decision, a decision with respect to a motor vehicle salesman's application which was heard before the Tribunal on July 27, 1983, was included as well, the builder was clearly told what had to be done. Of course, where registration is the most important aspect of being able to continue in this business, the responsibility on the builder was clear.

The Tribunal has concluded that we have no power to reverse the decision of the New Home Warranty Program which is that the builder is not registered. We are bound by the Act and by the Regulations and as I have stated while the Program may choose to cure a registration defect, it is in our view not possible for us as a Tribunal to require that such a thing be done.

Therefore, the motion made by Mr. Campbell on behalf of the Program that the Commercial Registration Appeal Tribunal does not have jurisdiction in this matter because the builder Bonik Incorporated is not a registrant is accepted by the Tribunal.

ROY AND KAREN CAMPBELL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
EDWARD WEISZ, Member

APPEARANCES:

SCOTT M. MERRIFIELD, counsel for the Applicants

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 1 March 1993 Toronto

REASONS FOR RULING

Roy and Karen Campbell took possession of their new home at 99 Robert Street, in Ilderton, Ontario on November 1, 1989. On July 5, 1991, they submitted a Proof of Claim to the Ontario New Home Warranty Program ("the Program") for a major structural defect in their home based upon "faulty chemical concrete".

On July 23, 1992, the Program issued a decision letter concerning this claim as follows:

Firstly, under the provisions of the Ontario New Home Warranties Plan Act, ("the Act"), it is the Program's responsibility to make decisions on claims relating to warranty coverage and in that context, to decide whether to resolve the matter by way of a cash settlement to the claimant or have repairs completed. It is also our choice, where related to repairs, as to how the repairs are to be performed.

Secondly, the Program has accepted your clients' claim for a Major Structural Defect and, pursuant to Section 14(3), has elected to perform the remedial work necessary to correct this defect. We have had the specifications for remedial work prepared, have a signed contract and are

now in a position to commence the work. We are not prepared to cash settle.

Once repairs are complete, the Program's liability concerning those repairs continue for a period of one year. It is, therefore, in our interest to ensure repairs are effective and properly completed.

Thirdly, if the Program is not permitted to complete remedial work now, it will not assume any responsibility for any further deterioration and costs associated to the delay. We will only be responsible for work and cost based on our recent engineering analysis, resultant scope of work and the existing contract price. Further, if we are not able to commence work by the end of August of this year, it is highly unlikely that any work will be possible until the summer of next year, given the seasonal nature of the required remedial work.

Fourthly, the warranties under the Act are in respect of the home itself; therefore, even if the home were to be sold as you suggest, the Program's liability is not relinquished as the successor in title would be entitled to have the repairs completed. This further supports our position as to why a cash settlement is inappropriate.

Finally, the foregoing represents the Program's decision with respect to your clients' claim and, pursuant to Section 16 of the referenced Act, your clients have the right to appeal this decision to the Commercial Registration Appeal Tribunal. The process is as outlined in Section 16(2) of the Act and you may govern yourself accordingly.

In submissions by counsel for the Applicants and by counsel for the Program, the Tribunal learned that the Program had accepted the claim as a warranted item; that initially a possible 45 single family homes and 3 condominium projects were thought to have faulty concrete; and that about a dozen homes have been

repaired as the Program intends to repair this house.

Counsel for the Applicants stated that his clients are not content with the procedure which the Program has proposed where four tenders for the repairs were received in May 1992 where costs varied from \$89,000 to \$174,000 to do the necessary work. He said that engineers retained by his clients prefer a different procedure to do the repairs and he would propose that the Tribunal hear evidence on the two possible methods of repair and then direct which is to be used by the Program.

Counsel wrote to this Tribunal on November 3, 1992 stating that the reasons for his clients' appeal are:

- (1) The owners seek damages in lieu of the performance of repair;
- (2) The method of proposal is not in accordance with sound engineering principles and is contrary to engineering advice received by the Ontario New Home Warranty Program;
- (3) The contractor and its subcontractors are not qualified to carry out the work required;
- (4) The structural defect is so fundamental to the structural integrity of the residence that only demolition and reconstruction would be an adequate remedy for the owners;
- (5) The Ontario New Home Warranty Program has awarded the repair contract on the basis of cost only without regard to the deficiencies in the proposed methodology of the successful bidder.

Counsel for the Program stated the claim of a major structural defect is accepted and with engineering and consulting reports and a contract arranged after tenders were received, the Program would remove and replace the foundation of this house as other homes have been similarly repaired. He said that the Program, by Section 14(3) of the Ontario New Home Warranties Plan Act, ("the Act"):

... may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

He said that the problem is understood and will be remedied, that there are performance guarantees and bonds in place from the general contractor and that the owners will not allow the

work to be done. If the repairs fail, then the owners can appeal to this Tribunal but not before the Program has the opportunity to do whatever work is deemed necessary by the Program, he said. There is no intention to make any cash settlement of this claim as the Program wants to assure that this house is properly repaired so that any subsequent owner is protected, he said.

Counsel for the Program suggests that this claim has led to a premature appeal to this Tribunal, since concerns about the possible failure of repairs are speculative. He proposes that this matter be adjourned at least until after any repairs are attempted and completed and the opportunity for an appeal then can occur. If the owners do not allow access to the Program to do the necessary work, then the appeal would never proceed.

The Tribunal has considered the arguments which counsel have made. The Ontario New Home Warranty Program has been in place some years in order to protect and assist homeowners to resolve matters which are found to be warranted and appear by a quick reference to the Statute to be concerns of workmanlike construction of a home being fit for habitation and for a home being constructed in accordance with the Ontario Building Code.

As a result of the Program, buyers within Ontario have been able to have a recourse which is more efficient and practical than the traditional remedy of having to go before the Courts. As part of the process to protect new home buyers, there is an appeal procedure to this Tribunal. That appeal procedure depends upon first of all the warranties that are set out in Section 13 and their exclusions and secondly, the fitting in of a claim under Section 14 where compensation is allowed. As an aspect of that compensation, the Program can arrange to have certain work done by receiving competitive bids or depending on the size of a claim ordinarily, it can arrange to make a cash settlement so that an owner who has a variety of warranted claims and items which perhaps may be many in number, but not of great value individually can then have a cash payment and arrange to do the variety of repairs personally or through a separate contractor.

A decision has been given by the New Home Warranty Program with respect to the claim which has been advanced by Mr. and Mrs. Campbell. It is my understanding and that of my colleague Mr. Weisz that the Program accepts the claim to be a valid one. There is no requirement, therefore, to substitute the opinion of the Tribunal for that of the Program in allowing or disallowing a certain item. The Program agrees that certain work has to be done, the next step then is to arrange for that work to be done in accordance with the rules set out by the Program. We have considered the comments which counsel have made and it would appear that the Program is willing and able to go ahead and do certain

repairs which in turn would be guaranteed and from the failure of which an appeal could be taken to this Tribunal. However, we believe that we cannot say in advance what procedure the Program should follow, what results might occur or what future problems might exist.

We have concluded that the Program must be given the opportunity to effect the repairs. If the repairs are satisfactory, all is well. If they are not, then there is an appeal which can come to this Tribunal. We do not know which of several ways of fixing this major problem is the best one to choose. The Program has the responsibility to do the best work it can and the liability to the owner to resolve any problems if the effect of those repairs is not satisfactory. We believe that the Program must have the responsibility and the opportunity to attempt these repairs before there can be any claim that comes to this Tribunal.

It may well be that the owners of this home Mr. and Mrs. Campbell are uncertain as to what these repairs may develop into and whether they will be satisfactory or not. They may have some concerns over the other homes of which they have heard where no doubt some repairs were better effect than others, perhaps with results that were satisfactory to the buyers, the owners and perhaps requiring other work. We do not know that and cannot speculate as to what might happen. Therefore, we find that the appeal cannot be based upon the failure of the Program to allow the claim. The claim is allowed, the next step is to how it should be repaired and a decision as to how those repairs are to be done is the responsibility of the Program. If the repairs fail then an appeal can be brought before the Tribunal. But until those repairs occur, we cannot say which manner should be followed in order to do the repair.

In the result, we believe that this claim should be adjourned sine die, that is to say without a firm date being fixed, and if whatever repairs are proposed and effected fail, then an appeal can properly come before the Tribunal. Until that occurs, we believe that we do not have the jurisdiction to interfere with the procedure that has been suggested. We will adjourn the claim sine die.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1990, CHAPTER 0.31

IN THE MATTER OF the REGISTRATION of
CANDA DEVELOPMENT INC.
as Builder

AND IN THE MATTER OF the PROPOSAL of the Registrar under the
Ontario New Home Warranties Plan Act
made pursuant to Section 9(1) of the
Ontario New Home Warranties Plan Act
TO REFUSE THE APPLICATION FOR REGISTRATION
- Decision dated: 10th day of August, 1992;

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to Section 9(2).
- Requirement dated: 18th day of August, 1992.

CANDA DEVELOPMENT INC.

Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

CONSENT ORDER

UPON the application to the Tribunal by counsel for the Registrar under the Ontario New Home Warranty Program for issuance of a Consent Order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1990, S.22, and upon reading the consent of the parties hereto, this Tribunal directs the Registrar to grant registration to the Applicant, Canda Development Inc. ("Canda") subject to the following terms and conditions:

1. Canda will provide the Warranty Program with a Guarantee in the Warranty Program's standard form signed by its principals, Cham Wai Lai and Ping Cheung Tsang, within ten days hereof;
2. Canda will provide the Warranty Program with bank references for Messrs. Lai and Tsang and for Canada Management Inc., within ten days hereof;
3. Canda will provide the Warranty Program with a copy of any and all contracts between Canda and a registered vendor (as contemplated by clause 4.4(d) of the Vendor/Builder Agreement) within ten working days of signing such agreement(s);

4. Canda will not commence construction of a home or apply for a building permit for a home unless and until it has provided the Warranty Program with a copy of the contract between Canda and a registered vendor relating to that home;
5. Canda will not construct or commence construction of more than eight homes within the first year of registration unless it obtains the prior written consent of the Registrar.

NOW THEREFORE this Tribunal Orders that the proceedings in this matter be and the same are disposed of without a hearing as against the Applicant on the basis of this Consent Order.

BRIAN COGGIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding

APPEARANCES:

SUSAN J. HEAKES, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 10 May 1993

Toronto

REASONS FOR RULING

I must take the position that following the decision in the Campbell case, that is virtually on all fours with the case before us, it is premature for this Tribunal to hear any evidence on the merits of this matter until after the proper time for an appeal has been given to the Applicant after the work has been done.

It is obvious that the Program has not had the opportunity to perform its obligation which is a statutory obligation under subsection (3) of Section 14 and until that has been satisfied then I take the position that this Tribunal does not have the proper jurisdiction to hear the matter. Having said that the question is what to do with this motion.

In the previous matter, the Tribunal adjourned the hearing sine die. I am not sure that that is the proper disposition of this matter because when it comes, if it does, before the Tribunal at a future date, there may be some if not different grounds, different aspects of the appeal which are not evident at the time of the motion.

Under the circumstances, I am certainly willing to be guided by counsel on this point. It is my view that the motion be upheld and the appeal disallowed without prejudice to the appellant to bring his appeal before this Tribunal at any subsequent time on the same issues as are argued today and I am of the view that that is probably the most practical disposition of the matter because it

gives Mr. Coggin an opportunity to set out grounds for appeal which are not presently before me.

This matter is now concluded.

The ruling and reasons therefor were orally given by the Chairman at the conclusion of the hearing.

PAUL EARLE and DALE PRAUGHT

APPEAL FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

PAUL EARLE, appearing on his own behalf
DALE PRAUGHT, appearing on his own behalf
BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 28 May 1993 Toronto

ORDER

Upon the application of the Applicants Paul Earle and Dale Praught for an Order restricting this hearing to the issue of the responsibility of the Ontario New Home Warranty Program to refund deposits to persons who purchase more than one home regardless of their intentions with their houses and specifically to conclude that the issue of the validity of the purchase agreements in question and the claims upon them had already been determined in favour of the Applicants by a decision and reasons for judgment of Thomas J. in the Ontario Court (General Division) on July 3, 1992 and is therefor not an issue with which the Tribunal shall deal with at this hearing and upon hearing the representations of the Applicants and of counsel for the Respondent, the Tribunal determined that this hearing should not be restricted as requested and that, at the hearing all parties should be entitled to raise all issues which need to be determined to reach a proper decision and to lead all evidence which is relevant and admissible to determine the same.

Upon this conclusion upon this issue, the Applicants asked for an adjournment to allow them to have counsel present on their behalf for the hearing on this basis. Counsel for the Program consented to this application and accordingly the hearing is adjourned to a date to be fixed by the Registrar.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1990, CHAPTER 0.31

IN THE MATTER OF the REGISTRATION of
810379 ONTARIO INC.
as Builder

AND IN THE MATTER OF the PROPOSAL of the Registrar under the
Ontario New Home Warranties Plan Act
made pursuant to Section 9(1) of the
Ontario New Home Warranties Plan Act
TO REFUSE TO RENEW THE REGISTRATION
- Decision dated: 8th day of June, 1992

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to Section 9(2).
- Requirement dated: 24th day of June, 1992, by

810379 ONTARIO INC.

Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

ORDER

UPON application, the Tribunal hereby directs that this
matter be settled in accordance with the Minutes of Settlement as
attached hereto.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO, 1990, CHAPTER 31

810379 ONTARIO INC.

and

ONTARIO NEW HOME WARRANTY PROGRAM

MINUTES OF SETTLEMENT

WHEREAS 810379 Ontario Inc. (the "Corporation") was registered as a Vendor/Builder in the Ontario New Home Warranty Program (the "Program") pursuant to the provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1990, Chapter 31, on May 17, 1990 (the "Registration");

AND WHEREAS the Corporation was required to renew the Registration on or before May 17, 1992;

AND WHEREAS an Application For Renewal of Registration dated March 10, 1993 was received by the Program on March 15, 1993;

AND WHEREAS a Notice of Proposal dated June 8, 1992 to refuse to renew the Registration of the Corporation, together with written reasons therefor, issued by the Registrar of the Program (the "Proposal"), was served upon the Corporation on June 15, 1992, by registered mail;

AND WHEREAS the Corporation has required a hearing by the Commercial Registration Appeal Tribunal ("C.R.A. T.") into the matters alleged in the Proposal;

AND WHEREAS a hearing by C.R.A.T. has been scheduled for May 17, 1993;

AND WHEREAS pursuant to Section 4 of the Statutory Powers Procedures Act R.S.O., as amended, the parties desire to have the proceedings disposed of by way of Consent Order issued by C.R.A.T.,


NOW THEREFORE in consideration of the terms and conditions herein contained, and other good and valuable consideration, the parties hereto agree as follows:

1. The Corporation and the Program agree to dispose of the proceedings before C.R.A.T. by way of Consent Order, without the necessity of a hearing and hereby authorize their respective counsel to execute any and all documentation to give effect to such agreement.
2. The Corporation hereby admits the allegations contained in the Proposal.
3. The Corporation agrees to compensate the Program for monies previously paid out of the Guarantee Fund in respect of the Corporation's violation of its statutory obligations, as follows:
 - i) The Corporation agrees that the total amount of compensation due and owing to the Program, as per this negotiated settlement, is \$16,923.34;
 - ii) The Corporation shall pay to the Program, not later than May 31, 1993, the sum of \$5,000.00, by way of cash or certified cheque;

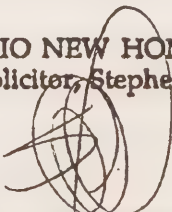
- iii) The principal balance remaining of \$11,923.34 shall be payable to the Program by way of blended monthly payments of principal and interest, calculated at the interest rate of 7% per annum, compounded monthly, until the entire debt has been repaid, in accordance with the repayment schedule attached hereto as Schedule "A".
- iv) Concurrent with the execution of these Minutes of Settlement, the Corporation shall provide to the Program 24 post-dated cheques, representing each and every monthly payment hereinbefore contemplated by Clause 3 (iii) hereof.
- 4. The Registrar of the Program agrees to refrain from carrying out his Proposal to refuse to renew the registration of the Corporation and the registration of the Corporation shall be renewed.
- 5. In the event that the Corporation shall default on any monthly payment contemplated by Clause 3(iii) hereof, or fail to satisfy any other term or condition of this agreement, the Corporation acknowledges and agrees that the Registrar shall revoke the registration of the Corporation forthwith, upon the grounds set forth in the Proposal, which grounds are specifically admitted by the Corporation, without any further notice to the Corporation, other than Final Notice of Revocation.

THIS AGREEMENT is made this 14th day of May, 1993.

810379 ONTARIO INC.
by its solicitors, Ross and McBride



ONTARIO NEW HOME WARRANTY PROGRAM
by its solicitor, Stephen A. Austin



SCHEDULE "A"

Prepared for Stephen Austin
 Principal \$11923.34
 Interest Rate 7.000%
 Compounded 12 times per year
 Interest Factor 5.8333333333333329D-03
 Monthly Payment \$500.00
 Starting Jul 01/1993

Month	Payment Number	Monthly Payment	Interest Payment	Principal Payment	Balance of Loan	Cum Intr Per Yr	Per Dien
Jul 1/93	1	\$569.55	\$69.55	\$500.00	\$11423.34	\$69.55	\$2.25
Aug 1/93	2	\$566.64	\$66.64	\$500.00	\$10923.34	\$136.19	\$2.15
Sep 1/93	3	\$563.72	\$63.72	\$500.00	\$10423.34	\$199.91	\$2.05
Oct 1/93	4	\$560.80	\$60.80	\$500.00	\$9923.34	\$260.71	\$2.00
Nov 1/93	5	\$557.89	\$57.89	\$500.00	\$9423.34	\$318.60	\$1.90
Dec 1/93	6	\$554.97	\$54.97	\$500.00	\$8923.34	\$373.57	\$1.81
Dec 31/93	***Interest for the Year Ended Dec 31/93***				\$8423.34	\$423.94	
Jan 1/94	7	\$552.05	\$52.05	\$500.00	\$7923.34	\$1.68	\$1.71
Feb 1/94	8	\$549.14	\$49.14	\$500.00	\$7423.34	\$50.82	\$1.62
Mar 1/94	9	\$546.22	\$46.22	\$500.00	\$6923.34	\$97.04	\$1.52
Apr 1/94	10	\$543.30	\$43.30	\$500.00	\$6423.34	\$140.34	\$1.42
May 1/94	11	\$540.39	\$40.39	\$500.00	\$5923.34	\$180.73	\$1.33
Jun 1/94	12	\$537.47	\$37.47	\$500.00	\$5423.34	\$218.20	\$1.23
Jul 1/94	13	\$534.55	\$34.55	\$500.00	\$4923.34	\$252.75	\$1.14
Aug 1/94	14	\$531.64	\$31.64	\$500.00	\$4423.34	\$284.39	\$1.04
Sep 1/94	15	\$528.72	\$28.72	\$500.00	\$3923.34	\$313.11	\$0.94
Oct 1/94	16	\$525.80	\$25.80	\$500.00	\$3423.34	\$338.91	\$0.85
Nov 1/94	17	\$522.89	\$22.89	\$500.00	\$2923.34	\$361.80	\$0.75
Dec 1/94	18	\$519.97	\$19.97	\$500.00	\$2423.34	\$381.77	\$0.66
Dec 31/94	***Interest for the Year Ended Dec 31/94***				\$2423.34	\$398.27	
Jan 1/95	19	\$517.05	\$17.05	\$500.00	\$1923.34	\$0.55	\$0.56
Feb 1/95	20	\$514.14	\$14.14	\$500.00	\$1423.34	\$14.69	\$0.46
Mar 1/95	21	\$511.22	\$11.22	\$500.00	\$923.34	\$25.91	\$0.37
Apr 1/95	22	\$508.30	\$8.30	\$500.00	\$423.34	\$34.21	\$0.27
May 1/95	23	\$505.39	\$5.39	\$500.00	\$0.00	\$39.60	\$0.18
Jun 1/95	24	\$425.81	\$2.47	\$423.34		\$42.07	
Principal Paid		\$11923.34					
Interest Paid		\$864.28					

E. & O. E.

GREENLEAF HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: THERESA WALSH, Vice-Chair, Presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:

MARVIN TALSKY, Q.C.,
representing the Applicant

BETH SYMES, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 10 June 1993

Toronto

ORDER

Upon hearing evidence presented on behalf of the Ontario New Home Warranty Program, this matter was adjourned pending settlement discussions between the parties.

Upon hearing the consent of both parties to this Order, this Tribunal, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, directs the Registrar to carry out its Proposal dated January 13, 1993, to refuse to renew the registration of Greenleaf Homes Inc. effective forthwith.

ONTARIO NEW HOME WARRANTIES PLAN ACT

REVISED STATUTES OF ONTARIO, 1990, CHAPTER 0.31

IN THE MATTER of the REGISTRATION of IVORY FOREST HOMES INC.

AND IN THE MATTER OF A PROPOSAL of the REGISTRAR of the
ONTARIO NEW HOME WARRANTY PROGRAM to REVOKE THE REGISTRATION

- Proposal dated: 13th day of April, 1992;

AND IN THE MATTER OF a requirement for a hearing respecting the
said Proposal pursuant to Section 9(2)

- Requirement dated: 27th day of May, 1992 by

IVORY FOREST HOMES INC.

Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

ORDER

UPON reading the Notice of Proposal, and upon hearing the evidence
provided by the Ontario New Home Warranty Program (the "Program")
and on behalf of the applicant Ivory Forest Homes Inc. ("Ivory"),
the Commercial Registration Appeal Tribunal ORDERS:

1) That Ivory pay to the Program the sum of \$23,210.00 by
certified cheque by June 30, 1993.

2) That Ivory provide audited financial statements for the
year ending June 30, 1993 to the Program by July 15, 1993.

3) That Ivory provide to the Program a surety bond or other
satisfactory security in the amount of \$20,000.00 for each of the
homes now under construction and for each other home as a building
permit is obtained.

4) That Ivory does not accept any deposit on the sale of any
current or future home in an amount greater than \$20,000.00.

5) That Ivory provide to the Program by June 15, 1993 a list
describing all properties upon which homes are now under
construction together with copies of all outstanding Certificates
of Completion and Possession.

6) That Donald Kett provide a notarized statement of personal
net financial worth by July 15, 1993 and attend to complete any
interview or written examination which may be required of him by
the Program.

7) That if any of the items 1) to 6) are not completed to the

satisfaction of the Program then the Registration of Ivory Forest Homes Inc. as a builder shall be revoked forthwith without any further right to a hearing before this Tribunal.

BLAINE LAROCK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
SELWYN CHARLES, Member
EDWARD WEISZ, Member

APPEARANCES:
BLAINE LAROCK, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 13 January 1993 Toronto

REASONS FOR RULING

With the consent of the Applicant and the Ontario New Home Warranty Program, and under reserve of all their rights, in view of the case of Julio Carvalho which is presently in appeal, and which deals with the same legal issue as the present case, this case is postponed until final judgment is rendered in the Carvalho case. At that time, after the delays for appeal have expired, the Registrar will place this case on the roll for an expeditious hearing.

If for any reason the appeal does not proceed, either by virtue of settlement or one of the parties withdrawing from the appeal, Ms. Rutherford, on behalf of the Ontario New Home Warranty Program, will immediately so advise the Tribunal in order that the case of Blaine Larock may proceed.

The above Ruling and reasons therefor were orally given at the conclusion of the hearing by the Vice-Chairman in the presence of the other members who concurred.

LUKA'S CUSTOM HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding

APPEARANCES:

ELIZABETH WOLFE,
representing the Law Society (added Party)

NETANUS RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 31 March 1993

Toronto

REASONS FOR RULING

This is an application for an adjournment brought by counsel for the Law Society on behalf of the Society and its insurers who appear to be intervenors in this matter and added parties at the last hearing when this matter was first dealt with on December 18. At that time, the intervenor and the builder apparently were not ready to proceed and an adjournment was sought and granted at that time on consent and on the condition that the matter be set over for hearing on April 5, at which time it was set peremptorily to be heard.

The issue is apparently between the builder and the Ontario New Home Warranty Program. It is not an issue in my view which involves in any respect the Law Society under the Ontario New Home Warranty Plan Act. Whatever the merits of the case or the appeal are, they are confined to whatever issues have arisen as a result of the application of that Act. The Law Society has come into the picture, but no sufficient reason has been advanced why the builder and the Ontario New Home Warranty Program should not proceed with its hearing. It does not appear from the representations of Ms. Wolfe on behalf of the Society that the builder is not ready to proceed on Monday, April 5. He has consented to this adjournment and in his absence, we accept that as a consent to an adjournment but on the other hand there has been no issue raised as to whether or not he is able to proceed and I am assuming that he could proceed on Monday.

The issue, therefore, being between the Ontario New Home Warranty Program and the builder is one which is paramount in these proceedings before this Tribunal. Whatever arises out of those proceedings in the interests of the intervenor may well be of great material significance to the intervenor, but at the same time should not prejudice the proceedings between the Program and the builder.

I am not going to grant this adjournment. The reasons I think I have indicated are that there are insufficient reasons on behalf of the builder, none really advanced on behalf of the builder why the matter should not proceed and it is vigorously opposed by Ms. Rutherford on behalf of the Program. Secondly, the matter was set peremptorily to be heard on April 5 and if that word means anything in the law profession, it must be observed barring circumstances which are completely beyond the control of the parties or one of the parties. There is a third reason why the Tribunal is not disposed to grant this adjournment - because this being a matter between the builder and the Program, we are always concerned with the prejudice to the public. Most of these proceedings between the builder and Program involve the manner in which a builder has behaved toward the public. Under those circumstances, it may be by letting this matter proceed at a later date prejudicial to the public interest.

The Tribunal does not have the flexibility of other forums. We have very very tight schedules set and when they are set, it is not only an inconvenience to the members of the Tribunal and to the operation of the schedule, but it is a definite prejudice against certain parties who are involved in the appeal. Under the circumstances, we must disallow the motion and the matter subject to any further representations by counsel will proceed on Monday, April 5.

The above ruling and reasons therefor were orally given at the conclusion of the meeting by the Vice-Chairman.

CAPTAIN GERARD MURRAY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

CAPTAIN G. MURRAY, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 7 June 1993

Toronto

REASONS FOR RULING

This motion was brought by counsel for the respondent at the opening of the hearing for an Order that this hearing be adjourned sine die to permit the Ontario New Home Warranty Program to complete its proposed repairs. The application for the adjournment was opposed by the Applicant. There was agreement between the parties as to the facts relevant to the determination of the motion.

The Applicant has made a claim against the Program pursuant to the provisions of Section 13(1) and Section 14 of the Ontario New Home Warranties Plan Act alleging a defect or defects which result in water leaking into his basement. The Program has made an inspection of the situation and has made a decision that the defect or defects do exist and that they constitute warrantable defects pursuant to Section 13(1)(a) of the Act and has so advised the Applicant. The Program has proposed a certain method of repairs and the Applicant refuses to have the repairs done in this fashion and is asking for different remedial action to be taken. Both parties are in agreement as to the facts stated thus far although there are some additional statements of fact put forward by the Applicant which he alleges to be important with which the Program does not agree and with which I shall deal later.

The Program takes the position that at this stage the Applicant does not have the right to a hearing before the Tribunal arguing that this was precisely the point in issue which was determined by the Tribunal in the case of Roy and Karen Campbell,

a decision issued on April 15, 1993. Beginning at the top of page 5 of that decision, the Tribunal said:

A decision has been given by the New Home Warranty Program with respect to the claim which has been advanced by Mr. and Mrs. Campbell. It is my understanding and that of my colleague Mr. Weisz that the Program accepts the claim to be a valid one. There is no requirement, therefore, to substitute the opinion of the Tribunal for that of the Program in allowing or disallowing a certain item. The Program agrees that certain work has to be done, the next step then is to arrange for that work to be done in accordance with the rules set out by the Program. We have considered the comments which counsel have made and it would appear that the Program is willing and able to go ahead and do certain repairs which in turn would be guaranteed and from the failure of which an appeal could be taken to this Tribunal. However, we believe that we cannot say in advance what procedure the Program should follow, what results might occur or what future problems might exist. We have concluded that the Program must be given the opportunity to effect the repairs. If the repairs are satisfactory, all is well. If they are not, then there is an appeal which can come to this Tribunal. We do not know which of several ways of fixing this major problem is the best one to choose. The Program has the responsibility to do the best work it can and the liability to the owner to resolve any problems if the effect of those repairs is not satisfactory. We believe that the Program must have the responsibility and the opportunity to attempt these repairs before there can be any claim that comes to this Tribunal.

It may well be that the owners of this home Mr. and Mrs. Campbell are uncertain as to what these repairs may develop into and whether they will be satisfactory or not. They may have some concerns over the other homes of which they have heard where no doubt some repairs were better effect than others, perhaps with results that were satisfactory to the buyers, the owners and perhaps requiring

other work. We do not know that and cannot speculate as to what might happen. Therefore, we find that the appeal cannot be based upon the failure of the Program to allow the claim. The claim is allowed, the next step is to how it should be repaired and a decision as to how those repairs are to be done is the responsibility of the Program. If the repairs fail then an appeal can be brought before the Tribunal. But until those repairs occur, we cannot say which manner should be followed in order to do the repair.

In the result, we believe that this claim should be adjourned sine die, that is to say without a firm date being fixed, and if whatever repairs are proposed and effected fail, then an appeal can properly come before the Tribunal. Until that occurs, we believe that we do not have the jurisdiction to interfere with the procedure that has been suggested. We will adjourn the claim sine die.

The Applicant argued that the decision in the Campbell case should not be followed here because the method of repairs proposed by the Program would not meet the requirements of the Ontario Building Code and further that the building inspector of the Municipality will not issue a Building Permit to allow this work to be done. With regard to these objections it is the position of counsel for the Program that it can proceed with its proposed repairs and should be allowed to do so. Whether or not a Building Permit is required is an issue between the Program or its contractor, hired to do the work, and the building inspector or Building Department and this is not an issue which can be determined here.

Proper procedures exist, on the one hand for a party to require a Building Department to issue a Building Permit if he requires it and is entitled to it, and, on the other hand, for a Building Department to prevent work from proceeding without a Permit if it is in the right to do so. As noted above, neither of these issues can be determined by this Tribunal and, if either of them must be determined it will have to be in another place. Therefore, the issue between the parties on this motion remains the issue with which the Tribunal dealt in the Campbell decision.

Accordingly for the reasons set out in the Campbell decision, the Tribunal adjourns this hearing sine die.

Because of the additional problem which may exist here concerning a Building Permit, circumstances could arise in which one party wished to bring the hearing back on without the work having been done. It was unfortunate that witnesses were required to attend in Toronto this morning coming from a considerable distance before the issue on this motion had been determined. To avoid a reoccurrence of this the Tribunal will further direct that, if either party wishes to bring this hearing back on before the proposed repairs have been done, he or it should give seven days notice in writing to the other party of the intention to do this, before applying for a new date for such hearing, so that the other party may, if so advised, bring a motion to determine this issue before another date is fixed for the hearing.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1990, CHAPTER O. 31

IN THE MATTER OF A CLAIM BY
NIAGARA NORTH CONDOMINIUM CORPORATION NO. 42

AND IN THE MATTER OF THE DECISION OF THE
ONTARIO NEW HOME WARRANTY PROGRAM
TO DISALLOW THE CLAIM
- Decision dated: 20th March 1991

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 9(2)
- Requirement dated: 8th April 1991

TRIBUNAL:
THERESA M. WALSH, Vice-Chair, presiding
TIBOR PHILIP GREGOR, Member
HANS G. KEPPLER, Member

APPEARANCES:
JEFFREY GREENHOW, representing the Applicant

BETH SYMES, representing the Ontario New Home
Warranty Program

NIAGARA NORTH CONDOMINIUM CORPORATION NO. 42
Applicant
and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

CONSENT ORDER

Upon the application to the Tribunal by counsel for both parties for issuance of a Consent Order of the Tribunal pursuant to section 4 of Statutory Powers Procedure Act, R.S.O. 1990, S.22, and upon hearing submissions by counsel for both parties, and upon reading the consent of the Parties hereto, this Tribunal orders that the proceeding in this matter be and the same are disposed of without a hearing as against the Applicant, Niagara North Condominium Corporation No. 42 ("Niagara North") on the basis of this Consent Order, subject to the following terms and conditions:

1. The Ontario New Home Warranty Program (the "Program") will pay to Niagara North the sum of nine thousand dollars (\$9000.00) as full and final settlement of all outstanding issues, including the repairs of unit #309; and
2. Niagara North will hereby release the Program of any and all claims Niagara North may have had, has now or may have in the future arising out of the construction of 10 John Street, Grimsby, Ontario and any claims pursuant to the Ontario New Home Warranties Plan Act.

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ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1990, CHAPTER 0.31

IN THE MATTER OF a CLAIM by
BRIAN SILCOFF and ANNIE HALL

AND IN THE MATTER OF a DECISION of
the Registrar of the Ontario New Home Warranty Program
TO DENY THEIR CLAIM
- Decision dated: 8 December, 1992;

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to Section 16(2).
- Requirement dated: 31 December, 1992;

BRIAN SILCOFF and ANNIE HALL

Applicants

and
REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
and
A. BOURGON DESIGN & DEVELOPMENT CORPORATION

ORDER

UPON reading the Decision letter and the other materials
provided by the Ontario New Home Warranty Program, and upon adding
A. Bourgon Design & Development Corporation, the builder herein, as
a party to this hearing;

AND UPON hearing from counsel for all three parties, the
Commercial Registration Appeal Tribunal orders that this hearing be
adjourned sine die to be brought on by any one of the parties
herein upon 10 days' notice.

DATED at Toronto this 22nd day of June, 1993.

STRASSCORP HOLDINGS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES;

JOHN HUNT, representing the Applicant

RAJ ANAND, representing the Registrar under the
Ontario New Home Warranties Plan Act

DATE OF

HEARING: 17 September 1993

Toronto

ORDER

This matter came on for hearing this morning, at which time the Tribunal was advised that the parties had agreed to an adjournment upon terms and conditions set out in a letter between the parties dated September 15, 1993 and filed herein as Exhibit 3.

The Tribunal ordered the adjournment of the hearing upon these terms:

1. The hearing is adjourned sine die.
2. Subject to paragraph 3, Strasscorp Holdings Inc., agrees to provide by October 1, 1993, an irrevocable letter of credit in the format acceptable to the Ontario New Home Warranty Program in an amount sufficient to cover warranty obligations found to exist by the Warranty Program following the conciliation meeting scheduled to be held on Monday, September 20, 1993.
3. The Warranty Program agrees that if the conciliation meeting scheduled for September 20, 1993 is adjourned other than at the request of Strasscorp, then Strasscorp's obligation to provide a suitable letter of credit will be extended to a date two weeks

after the date on which the conciliation meeting is in fact held.

4. The irrevocable letter of credit to be provided by Strasscorp will be held by the Warranty Program pending the hearing or the satisfactory completion of Warranty obligations, whichever occurs first.
5. Strasscorp agrees not to sell, agree to sell, complete any sale, construct, agree to construct or continue to construct any home (other than as required to correct deficiencies in accordance with the preceding) until this hearing is determined, or the warranty obligations referred to above are satisfactory or completed, whichever ever occurs first.

URBANETICS LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:
GLENN SOLOMON, representing the Applicant
BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 3 May 1993 Toronto

ORDER

This matter having been adjourned on December 18, 1992, to come on this day and having come on this day, and the parties having agreed that the hearing should not proceed on this day, and the question having arisen as to whether the hearing should proceed on May 17, 1993 as next scheduled; and

Upon the application of counsel for the Applicant for a further adjournment from that date, and upon hearing the submissions of counsel for both parties;

The Tribunal hereby directs that this hearing be adjourned and that it reconvene on Monday, May 17, 1993 and continue that week through May 21, 1993 as scheduled.

URBANETICS LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 19 October 1993

Toronto

ORDER

This hearing commenced on September 23, 1991 and has continued, including dates for certain motions for 29 days spread over the intervening time. The hearing of the evidence was completed on August 19, 1993 and the date of October 25, 1993 and such days thereafter as might be necessary was fixed for the argument and the completion of the hearing.

This morning counsel for the Respondent brought a motion for an adjournment. The consent in writing of counsel for the Applicant was received being Exhibit 116 herein. During the course of the argument, the Tribunal made it clear that this hearing must be completed without a lengthy further delay. After ascertaining the availability of the various parties required to be present,

THE TRIBUNAL DIRECTED that the hearing be adjourned to **Friday, October 29, 1993** commencing at 8:15 a.m. and that it continue thereafter and be completed on the earliest possible dates in November or at the latest in December 1993.

WELLINGTON CONDOMINIUM CORPORATION NO. 48

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SELWYN CHARLES, Member
LOUIS A. RICE, Member

APPEARANCES:
W. GERALD PUNNETT, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 11 January 1993 Toronto

CONSENT ORDER

At the opening of this hearing, counsel for the Applicant advised the Tribunal that this matter had been settled and asked that its appeal be withdrawn. Counsel for the Respondent, Ontario New Home Warranty Program asked for an order from the Tribunal to which counsel for the Applicant consented.

Accordingly, pursuant to the authority vested in it by subsection (3) of section 16 of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow th claims of the Applicant.

JAMES KENNETH FOSTER

HEARING TO CONSIDER A MOTION FOR A STAY
OF AN ORDER OF THE
COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
GERRY BEECH, Member
J. TIM HOGAN, Member

APPEARANCES;

ELENA DEMPSEY, representing the Applicant

ROBERT CONWAY, representing the Registrar under the
Motor Vehicle Dealers and Salesmen Act

DATE OF
HEARING: 23 April 1993

Toronto

REASONS FOR RULING

Because of the emphasis that has been put on the time element, we shall give our decision quickly. Since there exists, a concurrent jurisdiction by other Courts, it gives the parties a chance to speedily seek the remedies they feel they need.

In terms of reaching our judgement, the Tribunal looked at certain of the circumstances on a prima facie basis. The first test is whether, *prima facie*, the Tribunal believes that the registrant is likely to have a substantial chance of proving his case before the upper courts; in that case, the Registrar in exercising his discretion would have exercised it unreasonably.

The Tribunal has taken as proven:

1. That four application forms over a period of approximately ten years were filed to which the answer "No" was given to a question asking whether the Applicant had faced any criminal convictions or charges; and

2. That during that period, beginning with the first application, there was a record of continuous criminal charges and convictions stretching from 1976 to January 7, 1991. The final of the four applications was only two months after the January 7, 1991 conviction.

We also have a letter given to us by counsel for the Applicant in which Foster's employer alludes to the criminal

conviction in 1990 to 1991 and says that termination of employment took place as a result thereof.

While it was not done formally, the Tribunal has heard and taken cognizance of certain statements made by counsel for the Applicant. We are referring to the history of the answer "No" given to the question on the application form. Mr. Forster's explanation was that with respect to the original application, an employer, whom the Applicant very much respected, suggested that the answer "No" be given to that question because he thought it "Should be of no concern to others". In all future applications the answer "No" was also given to that specific question, despite the fact that during the interval, there were other convictions that took place at relatively regular intervals between each of the further applications.

Now on that basis, it has got to be reasonable, on a prima facie basis, to believe that an appeal would succeed, knowing that the Applicant answered "No" on all the subsequent applications despite the fact that further criminal convictions were being obtained against him. And this, the Tribunal finds is not reasonable.

The question in the application itself is very clearly worded. Mr. Foster's answer "No" was unequivocal and untruthful. To hold that a superior Court would find that on the basis of one former employer stating that Foster did not have to answer that question honestly would then justify him in continuing to do so in the intervening eight years and this despite continuing convictions of serious nature would be unreasonable, if not untenable.

The Motor Vehicle Dealer's and Salesmen Act itself, which the Tribunal has the responsibility of enforcing, is clear. It seeks to maintain the status quo in favour of the registrant until a final judgment of this Tribunal is given. But once that judgment is given, the legislators have seen fit to change the status quo, if the judgement is in favour of the Registrar. In that instance, the registrant, until the appeal is heard, is deprived of his licence. The Tribunal is given the right and the discretion to stay that pending appeal, but only for reasons which it would find compelling.

In that regard, there is no doubt that Mr. Foster is unable to carry on as a salesman and this is a hardship. But this is a hardship which the Legislature of the Act must have been aware when it drafted the legislation; nevertheless, it saw fit to legislate that the status quo would change, once a judgement was rendered against a registrant by this Tribunal in favour of the Registrar. And the reason for this, presumably, was that after a

contested hearing on the merits, it was felt that the greater protection was now owed to the public.

The fact that the Applicant cannot practice his profession does not, therefore, constitute the extraordinary circumstances which would allow him to obtain leave for a stay - especially where a prima facie case has not been established. It is on this basis, therefore, that the Tribunal must deny the motion of the Applicant for a stay, given the false answers by Mr. Foster in his applications, which were prima facie and according to a very long line of case law, the Registrar would have been reasonable in exercising his discretion when he determined that the registrant would not act with honesty and integrity. For these reasons, we are denying the motion of the registrant to be registered pending his appeal.

The above Ruling and Reasons therefor were orally given at the conclusion of the hearing in the presence of the other members who concurred.

MOTOR VEHICLE DEALERS ACT
REVISED STATUTES OF ONTARIO, 1990, CHAPTER M.42

IN THE MATTER OF the REGISTRATION of
642855 ONTARIO INC. o/a AVANTI FINE CARS
as a motor vehicle dealer

AND IN THE MATTER OF the PROPOSAL by the
Registrar of Motor Vehicle Dealers and Salesmen
pursuant to Section 7(1) of the Motor Vehicle Dealers Act
TO REVOKE THE REGISTRATION
- Proposal dated: 8th day of March, 1992;

AND IN THE MATTER OF a requirement for a hearing
respecting the said Proposal pursuant to
Section 7(2) of the Motor Vehicle Dealers Act

642855 ONTARIO INC. (AVANTI FINE CARS)
Applicant
and
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

CONSENT ORDER

Upon hearing the evidence in this appeal presented by Morteza Rasekhi and by and on behalf of the Registrar of Motor Vehicle Dealers and Salesmen, and upon the application to the Tribunal for issuance of a Consent Order of the Tribunal, this Tribunal directs the Registrar of Motor Vehicle Dealers:

a) to suspend the registration of 642855 Ontario Inc. o/a Avanti Fine Cars as a motor vehicle dealer immediately until June 30, 1993, within which time or earlier Morteza Rasekhi, as President of the registrant must arrange complete compliance with the requirements of Section 13(3) of Ontario Regulation 801, so that this wholesale business is carried on from an approved premises where an office is in operation and a sign is properly displayed; where a correct address is used on all business documents; where the Statutory Declaration required by the Registrar for a wholesale operation is completed and where the Registrar is satisfied with all requirements after a full inspection occurs of the business premises and of all the present and past business records of the registrant.

b) to revoke the registration of the registrant on June 30, 1993 without the requirement of any hearing or other reference to this Tribunal if the conditions required under the suspension have not been fulfilled.

JAMES STOGDILL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
SELWYN CHARLES, Member
PETER MENZELL, Member

APPEARANCES;
SIMON VAN DUFFELEN, representing the Applicant

GEORGE GLASS, representing the Registrar under
the Motor Vehicle Dealers Act

DATE OF
HEARING: 1 February 1993 Toronto

REASONS FOR RULING

This is a matter brought before us for interpretation of a decision of a previous Tribunal which was made on December 7, 1989.

The Tribunal at that time considered that Mr. Stogdill had been guilty of certain infractions under consumer legislation but instead of agreeing with the Registrar that his registration should be revoked entirely, the Tribunal exercised its privilege of attaching conditions to his registration. The condition being "That during the period of his licence, the licensee shall not be employed by a motor vehicle dealer engaged in consignment selling of motor vehicles and the licensee shall file with the Registrar a Certificate of his employer from time to time to this effect."

It is argued by counsel for the Registrar, Mr. Glass, that the proper construction of this condition is that it has unlimited effect as far as Mr. Stogdill's registration is concerned and, therefore, he is barred from engaging in that type of practice in selling consignment motor vehicles at any future time.

On the other hand, it is argued by Mr. Van Duffelen, counsel for Mr. Stogdill, that the condition applies only during a period in which Mr. Stogdill's licence was to be renewed and that the condition terminated in the renewal without any further conditions applying to that renewal.

The Tribunal has given full consideration to both arguments and it is clear from the succeeding paragraph in the judgement of the Tribunal that they considered very seriously a restriction which might be applied indefinitely. I quote,

In view of the circumstances of this case, however, the Tribunal is of the opinion that some restrictions should be appended to the registration of the Applicant herein. Because the problems giving rise to the decision of the Registrar in his Proposal emanated from consignment selling and notwithstanding that there have been changes made in the practices of Huron Park Nissan Ltd., the Tribunal believes that as a condition of continuing his registration as a Motor Vehicle salesman, Stogdill should be prohibited from engaging in consignment sales or being employed by a dealer who is selling motor vehicles on consignment.

That was the view of the Tribunal in expressing its opinion and what happened in the intervening period until the decision was finally transcribed one can only speculate on. The Tribunal, however, did not use the same wording in the prescription when it said, "During the period of this licence, the licensee shall not be employed....". The Tribunal very specifically referred to during the period of this licence. We can only interpret that as during the period in which Mr. Stogdill was licensed until his renewal was to take effect or until his licence was terminated, depending upon his choice whether or not he wished to renew his licence. I use the word licence because it was used by the Tribunal in this decision, although the word licence was never used in the Motor Vehicle Dealers Act with reference to a registrant. The word registrant is used and registration is used; licensing is not used except in connection with a driver's licence or permit or an automobile licence or permit. But it is not used with reference to a salesman. The Tribunal perhaps carelessly used this word licence, but very obviously treated the word licence as being a period of time until it must be renewed. It is a right that the registrant had until either it was terminated by lapse of time or until it was renewed by his own application or restricted by a further decision of the Tribunal or the Registrar.

Under the circumstances, we find that the words "during the period of this licence" is the period which extends from December 7, 1989 when the decision was given and released on February 19, 1990 until the renewal of the licence on December 31, 1990. Now having regard to Section 1(b) of the Registrar's

Proposal alleging Stogdill is in breach of a term and condition of registration any evidence that the Registrar wishes to introduce with regard to this man's conduct during a certain period of time must be entirely restricted to the ten-month period from February 19 until the lapse of his licence or its renewal on December 31, 1990 when the restriction applied. On the other hand, there is a further Proposal of the Registrar that is contained in Section 1(a) and that refers to past conduct, reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty and on that point the Tribunal, of course, is quite free to hear any evidence with regard to it.

WILLIAM AINIS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
GARY ZALEPA, Member

APPEARANCES:
TIMOTHY S.B. DANSON, representing the Applicant

JAMES GIRLING, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 12 February 1993 Toronto

REASONS FOR RULING

This is a motion brought by Mr. Danson on behalf of the Applicant for an adjournment in a matter which we must concede has gone on for an interminable length of time although not necessarily by design on either of the parties. It is a unfortunate circumstance that seems to be derived from Mr. Danson's inability to accommodate his schedule either to that of the Registrar or this Tribunal. It is clearly and there is no evidence of it, it is clearly not the fault of the appellant Mr. Ainis and under the circumstances, of course, this Tribunal must be aware of his full rights and do not wish under the circumstances to prejudice them. In considering the application, we have taken full consideration of the circumstances surrounding the Registrar's application, his Notice of Proposal which indicates that the appellant, Mr. Ainis is a real estate broker severely in debt, might say to the amount of some \$260,000 if the judgements which are referred to in the Notice of Proposal and other Particulars, if the figures are correct may be more than that today. That sum of money representing almost a quarter million dollars, of course, would appear to be impossible for Mr. Ainis to retire no matter how long this matter goes on.

The representations by Mr. Danson include his proposal that this matter be adjourned until some date in March. Unfortunately, there is no date in March available since the Tribunal is double booked entirely during that month, and therefore, an adjournment to a date in March would simply mean putting the matter over to a future date. The Tribunal today would, having regard to all the facts, have complete justification

in refusing the adjournment because it is conceded by Mr. Danson that there is a probability of his being able to arrange for a junior to represent his client on Monday the 15th of February. It is acknowledged, however, in his representations that Mr. Ainis may not receive the best representation at that time because there may be a constitutional argument with which his junior would not be necessarily familiar. It would appear also that the matter which is going to be heard on the merits may be abbreviated considerably by an Agreed Statement of Facts so that very little evidence may be required and the matter may be completed in one day, there being only largely a legal argument required.

Under the circumstances, the Tribunal has considered that to be fair to Mr. Ainis and his counsel and to be fair to the Registrar, the dates from February 22, 23, 24 and 26 being available will be reserved. One or two of those dates will be reserved for hearing this matter on the merits. In the event the Registrar and his counsel are not available during any of those dates, then the matter is to proceed on Monday, February 15. The Tribunal has considered that by extending it to the 22 or 23 or 24 of February, it would give junior counsel an opportunity to prepare and adequately represent Mr. Ainis. That, of course, is subject to the Registrar's ability to be able to proceed at that time. We note that there are no Real Estate and Business Broker hearings before this Tribunal during those dates and that, therefore, the Registrar's office is not required to be here on any other matter during that time.

Having said that, we might point out that we are giving considerable latitude to counsel for the Applicant in order to attempt to be fair to his client and not prejudice the rights of the appellant. We might refer you gentlemen to the judgement of the Divisional Court, a recent judgement dated November 2, 1992 in which Mr. Justice Southey on a matter of an adjournment gave a decision, the issue was one where a builder asked for an adjournment, his counsel asked for an adjournment and the adjournment was refused. The matter was to proceed that day and there had been 3 days reserved for it I believe, but the matter was to proceed that day and counsel asked for an adjournment. The Tribunal refused the adjournment and the counsel for the development company with his client walked out of the courtroom and the Tribunal proceeded in the absence of the parties.

Mr. Justice Southey when the matter came up on appeal before the Divisional Court said "In our judgment the Tribunal was entitled to refuse the adjournment requested by Chantal and having done so to proceed with the hearing. The refusal of Chantal through counsel to remain at the hearing did not deprive the Tribunal of its jurisdiction under section 15 of the Statutory Powers Procedure Act and the Tribunal was entitled to act upon the

uncontested evidence submitted in support of the Proposal." That is a judgement which perhaps the parties might have found somewhat harsh, but on the other hand the Divisional Court has given its approval to the action of the Tribunal at that time. Today we are faced with a request for an adjournment and under the circumstances rather than proceed immediately, if it is possible at all for the Registrar to reserve any of the dates we have suggested, February 22, 23, 24 and 26, then the matter will proceed on one of those dates and we would, therefore, ask Mr. Girling to notify the Registrar immediately after we conclude this hearing as to his ability and his client's ability to be here, notify Mr. Danson accordingly and Mr. Danson will take the matter from there.

HOSEIN BEHMANESH

HEARING TO CONSIDER A MOTION BY THE APPLICANT
WITH RESPECT TO AN APPEAL FROM A DECISION
OF THE BOARD OF TRUSTEES OF THE
ONTARIO TRAVEL INDUSTRY COMPENSATION FUND

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding

APPEARANCES:

HOSEIN BEHMANESH, appearing on his own behalf

SUSAN B. CAMPBELL, representing the Board of Trustees

DATE OF

HEARING: 24 February 1993

Toronto

REASONS FOR RULING

This is a motion brought by Mr. Behmanesh to extend the time for appeal from the decision of the Trustees of the Ontario Travel Industry Compensation Fund which was delivered on the 20th day of August 1992. The evidence is that Mr. Behmanesh, although residing at the address to which the decision was directed by registered mail, did not receive it and no explanation is given as to why the registered letter was not brought to his attention. He subsequently apparently did communicate with the Registrar of the Travel Industry Act and received a Fax on August 20 from the Fund containing the decision and on September 4 directed his appeal from that decision to the Commercial Registration Appeal Tribunal and the Trustees of the Compensation Fund.

It is argued that this is a matter which can be considered pursuant to Section 10(8) of the Travel Industry Act which says despite any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act and where it is satisfied that there are apparent grounds for granting relief and that there are reasonable grounds for applying for the extension the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited and may give such directions as it considers proper consequent upon such extension. That subsection, of course, gives this Tribunal discretion in whether or not to grant this motion.

The evidence is hardly persuasive that the motion should be granted, but in considering that Section and the discretion within the jurisdiction of this Tribunal, the grounds for appeal can also be considered and I have given some consideration to the

grounds for appeal in which Mr. Behmanesh alleges that his claim constitutes a claim for \$529 commission fee. The Act is very specific in its application with regard to compensation and as the Tribunal Industry Compensation Fund Trustees have pointed out, Section 15(1) directs that a client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received travel services contracted for is entitled to claim for a refund of monies so paid. I find the grounds for appeal are not sufficient in any event for this Tribunal to grant the motion. Under the circumstances the motion is disallowed.

The above Ruling and reasons therefor were orally given at the conclusion of the hearing by the Vice-Chairman.

TAGIRAM BINDA
(TRINGO TRAVEL SERVICE)

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION AND
AND WITH RESPECT TO
AN ORDER FOR TEMPORARY SUSPENSION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
ASSELIN CHARLES, Member
PETER BONCH, Member

APPEARANCES:
H. MICHAEL KELLY, Q.C., representing the Applicant
BEVERLY WISE, representing the
Registrar under the Travel Industry Act

DATE OF
HEARING: 7 May 1993 Toronto

ORDER

UPON the application for an Order to extend the time of
expiration of the interim suspension herein pursuant to Section 7
of the Travel Industry Act;

AND UPON the application of counsel for the Applicant for
an adjournment of the application;

AND UPON the consent of counsel for the Respondent;

The Tribunal Does Hereby Order and Direct:

1. That the application be and the same is hereby adjourned
to a date to be fixed by the Registrar;
2. That the interim suspension herein pursuant to Section 7
of the Travel Industry Act be extended
 - (i) either until such time as this application is brought back on
for hearing;
 - (ii) or until such time as the Proposal to Revoke the registration
of the Applicant issued by the Respondent is concluded.

3. That the Applicant shall forthwith provide to the Respondent full details of all outstanding consumer transactions which it presently has and the Respondent shall send a person designated by him, pursuant to Section 17 of the Travel Industry Act to the office of the Applicant to satisfy the Respondent that proper care has been taken of all consumers with transactions outstanding with the Applicant;

4. The Applicant shall forthwith furnish to the Respondent the name of the registered Travel Agent to which it proposes to transfer these presently outstanding consumer transactions.

IN THE MATTER OF the Travel Industry Act, R.S.O. 1990, Chapter T.19 and Regulation 1085/90

- and -

IN THE MATTER OF the registration of Scott A. Smith, o/a Student Travel Services and/or STS

TRIBUNAL: James R. Breithaupt, Q.C., Chairman
APPEARANCES: Donald Bourgeois, representing the Registrar
DATE OF HEARING: May 26, 1993

ADJOURNMENT AND ORDER

UPON the Motion of the Registrar, Travel Industry Act;

UPON hearing the submissions of counsel for the Registrar; and

UPON being advised that the Adjournment and Order were on consent of all parties,

NOW THEREFORE, the Tribunal orders that:

- 1) the Registrar's Order of Temporary Suspension of the registration of Scott A. Smith, operating as Student Travel Services and/or STS is continued until this matter is heard before the Tribunal; and
- 2) the hearing be adjourned sine die, to be brought back on by the parties with sufficient days notice.

Court file no. 420/92

DIVISIONAL COURT
ONTARIO COURT (GENERAL DIVISION)

BETWEEN:

EQUIFAX/COLLECTCORP. INC.

APPLICANT
(APPELLANT)

and

THE REGISTRAR OF COLLECTION AGENCIES

RESPONDENT
(RESPONDENT IN APPEAL)

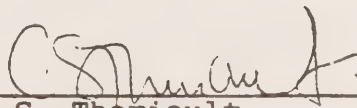
CONSENT

The appellant hereby consents to an order in the form attached hereto as Schedule "A" directing that the appellant may abandon this appeal on a without costs basis.

The appellant hereby certifies by its solicitors that no party to this appeal is under a disability.

Dated

April 22/93



Carmen S. Theriault
McMillan Binch,
Solicitors for the Appellant

SCHEDULE A

Court file no. 426/92

DIVISIONAL COURT
ONTARIO COURT (GENERAL DIVISION)

The ~~Honourable Mr.~~ Justice

) WEDNESDAY, THIS 28th DAY
)
) OF APRIL, 1993

BETWEEN:

EQUIFAX/COLLECTCORP. INC.

APPLICANT
(APPELLANT)

and

(Court seal)

THE REGISTRAR OF COLLECTION AGENCIES

RESPONDENT
(RESPONDENT IN APPEAL)

ORDER

THIS MOTION made by the appellant for an order permitting the appellant to abandon this appeal on a without costs basis was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M2H 2N5.

ON READING the consents of the appellant and the respondent filed,

THIS COURT ORDERS that the appellant may abandon this appeal on a without costs basis.

May E. Dayton

(Signature of judge or registrar)

Carvahlo v. Ontario New Home Warranty

689/92

Coram Hartt, O'Brien & Campbell, JJ.

Heard: July 26 1993

Decided: July 26 1993

ENDORSEMENT

It is common ground between counsel that the statute requires a contract for the provision of a home or an agreement to sell. Counsel for the respondent agrees that the statute requires that the contract or agreement must be legally enforceable.

The reservation agreement is not a contract for the provision of a home or an agreement to sell and it is not legally enforceable as such. The agreement makes it clear that the prospective vendor has no legal obligation to sell a home and no legal obligation to provide a home. The prospective purchaser acquires no right to acquire or buy a home. There is nothing to enforce against the prospective vendor. In the absence of any duty to sell or provide, and the absence of any right to buy or acquire, there can be no contract to provide a home and no agreement to sell a home.

It may have been the intent of the parties to buy and to sell, but there was no contract or agreement to do so. Naked intention does not trigger the legal contractual obligations that attract the protection of the statute.

None of the parole evidence of surrounding circumstances affects the legal essence of the agreement, which is a reservation or perhaps some sort of contingent option, but certainly not an enforceable contract to provide a home or an enforceable agreement to sell a home.

As the same tribunal differently constituted pointed out in Re McGivern and Ontario New Home Warranty Programme (January 25 1993), nothing in Platinum I Property Limited Partnership v. Ontario New Home Warranty Plan (1991) 1 O.R. (3d) 513 (C.A.) detracts from the statutory requirement that there must be, in essence, an agreement to sell as a necessary prerequisite to any entitlement against the guarantee fund.

The tribunal said in this case:

If the transaction between Mr. Carvahlo and the builder, in its essence, was for the provision of a home, then it comes within the Ontario New Home Warranties Plan Act.

The tribunal erred in thinking that it was sufficient that there merely be some kind of transaction for the provision of a home. The statute requires a very particular type of transaction; a contract to provide or agreement to sell; not simply a reservation agreement or some other form of contingent option or other transaction. If protection is to be extended to a class of transaction not specified in the legislation that is a matter for the Legislative Assembly, not the court.

The appeal is therefore allowed, the decision set aside, and the respondent's claim is disallowed. Having regard to the novelty of the point and the findings of fact, there will be no costs.

ONTARIO NEW HOME WARRANTY PROGRAM
APPELLANT

- and -

CASTLEGUARD HOMES (BURLINGTON) INC.
RESPONDENT

Court File No. 677/92

DIVISIONAL COURT

BEFORE HART, O'BRIEN, & CAMPBELL, JJ.

DATE 27 JULY 93.

DISPOSITION - THIS APPEAL IS ALLOWED.

~~THE~~ IT IS THE SPECIFIC ALLEGATION
AGAINST THE RESPONDENT RAISED
DE JURE ALLEGED PERSONAL GUARANTEE.
THE TRIBUNAL FOUND THIS WAS NOT PROVED.
HOWEVER THERE WAS SUBSTANTIAL
EVIDENCE SUPPORTING ALLEGATIONS THAT
DE JURE FIRST CONSUMER WAS GROUNDED
IN BELIEF THE RESPONDENT WOULD NOT
HONESTLY CARRY OUT ITS OBLIGATIONS
THOSE INCLUDED FAILURE TO REPAIR,
FAILURE TO REIMBURSE THE PROGRAM,
AND FAILURE TO REFUSE OF DE JURE'S

DIVULGING, MISDEEDS OF INTEREST IN
THE RESPONDENT'S RELATED COMPANY.

THESE MATTERS WERE ALL FULLY
EXPLORED AT THE HEARING, AND THE
RESPONDENT WAS GIVEN A FULL
OPPORTUNITY TO REPLY THEREIN.
THERE WAS NO FAILURE OF
NATURE VISIBLE.

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

THE HONOURABLE MR. JUSTICE SOUTHEY) Dated this 2nd day
THE HONOURABLE MR. JUSTICE WHITE and) of November, 1992
THE HONOURABLE MADAM JUSTICE CHARRON)

B E T W E E N:

CHANTAL DEVELOPMENT INC.

Applicant

- and -

COMMERCIAL REGISTRATION APPEAL TRIBUNAL
and ONTARIO NEW HOME WARRANTY PROGRAM

Respondents

ORDER

THIS APPLICATION was heard this day in the presence
of counsel for all parties.

ON READING the Notice of Application, Application
Record, Transcript of Evidence and Factum of the Applicant,
Chantal Development Inc.,

AND ON READING the Application Record and Factum of
the Respondent New Home Warranty Program;

AND ON READING, the Factum of the Respondent
Commercial Registration Appeal Tribunal;

AND ON HEARING the ⁷⁴⁴ submissions of counsel for the parties,

1. THIS COURT ORDERS that the Application is dismissed.
2. THIS COURT ORDERS that the respondent, Ontario New Home Warranty Program will have its party and party costs of the application, which are hereby fixed at \$7,500.00 and such costs to be paid by the Accountant out of the monies in court as securities for costs.
3. THIS COURT ORDERS that the Tribunal is not entitled to costs of this application.



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Dec. 10 '92
LF

CHANTAL DEVELOPMENT INC. and C.R.A.T. and
the O.N.H.W.P. Court File No.218/92
DIVISIONAL COURT
Proceedings commenced at OTTAWA

**TRANSCRIPTION OF ENDORSEMENT DATED NOVEMBER 2, 1992
OF THE HONOURABLE MR. JUSTICE SOUTHEY**

In our judgment, the Tribunal was entitled to refuse the adjournment requested by Chantal, and, having done so, to proceed with the hearing. The refusal of Chantal through counsel to remain at the hearing did not deprive the Tribunal of its jurisdiction. Under section 15 of the Statutory Powers Procedure Act, the Tribunal was entitled to act upon the uncontested evidence submitted in support of the proposal. The application is dismissed. The Program will have its party and party costs of the application, which are hereby fixed at \$7,500.00. Such costs to be paid by the Accountant out of the money in Court as security for costs. The Tribunal is not entitled to costs of this application.

ONTARIO COURT OF JUSTICE
GENERAL DIVISION
(Divisional Court)

THE HONOURABLE MR. JUSTICE) WEDNESDAY THE 14TH DAY OF
MONTGOMERY) APRIL, 1993
THE HONOURABLE MR. JUSTICE)
THEN and)
THE HONOURABLE MR. JUSTICE)
KILLEEN)

B E T W E E N:

RICHMOND SQUARE DEVELOPMENT CORPORATION

Appellant

- and -

MIDDLESEX CONDOMINIUM CORPORATION No. 134 and
ONTARIO NEW HOME WARRANTY PROGRAM

Respondents

ORDER

THIS MOTION, made by the Commercial Registration Appeal Tribunal (the "Tribunal") for an Order on Consent, granting leave to the Tribunal to intervene in this Appeal was heard this day at the Court House, 80 Dundas Street, London, Ontario.

ON READING the Notice of Motion and on hearing the submissions of counsel for Richmond Square Development Corporation, Middlesex Condominium Corporation No. 134 and Ontario New Home Warranty Program,

1. THIS COURT ORDERS that leave to the Tribunal to intervene is granted.

ENTERED AT LONDON	
In Book No.	0
As Docket No.	3950
OF	MAY 10 1993
m m d	

M. M. Hicks
REGISTRAR, DIVISIONAL COURT

ONTARIO COURT (GENERAL DIVISION)
(Divisional Court)

MONTGOMERY, THEN and KILLEEN JJ.

B E T W E E N:

RICHMOND SQUARE DEVELOPMENT
CORPORATION

Moving Party
(Appellant)

- and -

MIDDLESEX CONDOMINIUM
CORPORATION NO. 134 and
ONTARIO NEW HOME WARRANTY
PROGRAM

Respondents
(Respondents)

)
) P. Daryl Wilson
) John H. McNair
) for the Appellant
)
) Brian M. Campbell
) N. Rutherford
) for Ontario New Home
) Warranty Program
)
) Paul C. Strickland
) for Middlesex Condominium
)
) Rosalyn Train
) for The Commercial
) Registration Appeal
) Tribunal
)
) Heard: April 14, 1993
) (in London)

BY THE COURT:

This is an appeal from the decision of the Commercial Registration Appeal Tribunal ("C.R.A.T."), released on December 21, 1991.

The week before the appeal, the appellant filed a motion for leave to introduce fresh evidence.

The day of the appeal, the appellant filed an application for judicial review of the same decision.

THE FACTS

Richmond Square Development Corporation ("Richmond Square") was the builder of the condominium.

Anthony H. Gratt, Jr. is the president of Richmond Square. The Ontario New Home Warranty Program (the "Program") is the non-profit corporation designated to administer the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. 0.31 (the "Act"). The Act establishes a scheme of consumer protection for new homes and condominium buyers, including a registration system for vendors and builders, statutory warranties, and a statutory guarantee fund, from which the Program pays compensation to owners for breaches of warranty. The function of C.R.A.T. is to conduct hearings pursuant to the Act.

On March 1, 1989, the Condominium was registered pursuant to the Condominium Act. It is a 204 unit building located at 695 Richmond Street in London.

On July 12, 1990, a conciliation meeting was held. All parties were invited. The purpose was to determine what items were warrantable and what were not. Counsel for Richmond Square attended without his client.

As a result of the meeting a two-part Conciliation Decision was issued by the Program on August 20, 1990 and November 16, 1990 ("Conciliation Decision"). The Conciliation Decision noted which items of the Kleinfeldt Report were considered by Mr. Haskett to be warrantable and which were not.

Richmond Square was served with a copy of each part of the Conciliation Decision and pursuant to s. 16(2) of the Act, repeatedly gave notice that it required a Conciliation Hearing before C.R.A.T. with respect to the Conciliation Decision of Mr. Haskett. On January 21, 1991, C.R.A.T. communicated to Richmond Square that even though it was the party ultimately responsible for satisfying the matters set forth in the Conciliation Decision, it was not a "person or owner affected", as those terms are defined in s. 16(2) of the Act and was therefore not entitled to a Conciliation Hearing.

Section 16(2) states:

16. (2) A notice under subsection (1) shall inform the person served that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection (1) is served on him, notice in writing requiring a hearing to the Corporation and the Tribunal, and he may so require such a hearing.

Prior to the commencement of the Tribunal hearing to determine whether Richmond Square would continue as a registered builder under the Act, and without having served notice on the Program, Richmond Square obtained the November 21, 1991 decision of the Honourable Mr. Justice Borins in the Ontario Court (General Division), Toronto, compelling the Tribunal to hold a hearing under s.16 of the Act. The application also sought an injunction restraining the Tribunal from holding a hearing pursuant to s.9 of the Act in the interim. Richmond Square was the only party to appear. This order concerned the conduct of the Tribunal hearing and affected parties who had not been served.

Carruthers J., without agreeing with Borins J.'s interpretation of s.16(2) of the Act, directed C.R.A.T. to deal with both the registration of Richmond Square under the Act and the breach of warranties at the same hearing. Leave to appeal was denied by the Court of Appeal and the Supreme Court of Canada.

The Tribunal concluded that Richmond Square should not continue as a builder under the Act and confirmed the breach of warranties found by Mr. Haskett.

FRESH EVIDENCE

Richmond Square seeks to introduce the affidavit of Anthony Gratt to establish that counsel was not provided with five volumes of documents until two business days before the hearing; to be accurate, it was five calendar days before the hearing started.

Gratt's affidavit evidence is based upon what his counsel has told him and what he heard at the commencement of the hearing. The entire thrust of it goes to the legal duty to make disclosure and the alleged failure to produce a vast quantity of material well in advance of the hearing. These arguments appear to have been carefully considered by the Tribunal in their reasons for denying an adjournment.

When the Tribunal refused Mr. Wilson's request for an adjournment, he and his client left the hearing. The case proceeded in their absence for four days.

It is vigorously contended by the appellant that the hearing was nothing short of an ambush. The respondents say that Richmond Square was not taken by surprise. It built the building and knew what was wrong with it. Counsel for the unit owners objected to the characterization of the hearing as an ambush. He says there was no surprise to Richmond Square. They

knew in February, 1990 what was wrong with the building and their conduct amounts to wilful blindness.

The primary ground of appeal was the Tribunal's failure to grant Richmond Square an adjournment. The application to introduce fresh evidence is entwined in that ground of appeal. A great deal of the documentation was made up of transmittal letters and sundry correspondence. Exhibits 43 to 53 and 56 to 61 were entered without prior notice, but they are court orders and other prior proceedings, none of which can constitute surprise. At the heart of the matter are three documents that expand on the Kleinfeldt report. That is addressed in the Tribunal's finding of fact. At pages 11 and 12 of the decision, the Tribunal said:

The Tribunal is fully satisfied that substantially, all of the documents to which counsel for the builder objected, were in the possession of Richmond Square Development Corporation, or its previous solicitors, in advance of the commencement of this hearing. The books of documents, therefore, filed as Exhibits 36 and 37, are, in the view of the Tribunal, documents which were readily available to Richmond Square Development Corporation, and its solicitors. Whether it chose to make them available or not is not the responsibility of counsel before this Tribunal, or the Tribunal.

In considering the documents which have been reviewed, or put forward in evidence, the Tribunal has come to the conclusion that approximately 102 of

those documents were available, on their face, as against approximately 31 which may or may not have been available. It is difficult on the face of those documents, the 31 to which I refer, to be absolutely certain whether they may not have been in the possession of Richmond Square.

In any event, with respect to many of those documents, they appear to be simply covering letter documents, or other insignificant documents. Some of them appear to be in the nature of aides-mémoire, such as records of telephone conversations, which were used to refresh the memory of the witness, Mr. Haskett, from the Program.

With respect to the third volume, which was filed as Exhibit 38, these documents have been made the substantial substance of facts and evidence presented to this Tribunal. Having had the benefit of seeing these documents in the course of presentation of the evidence, the Tribunal finds, as a fact, that the principal document is that which was filed with the conciliation report, namely the Kleinfeldt Consultants' report, filed with the Program on February 23, 1990. The Tribunal finds that the subsequent detailed documents included in Exhibit 38, are simply expansions of items, clearly identified in the conciliation report. It is true that they become somewhat more specific, particularly in dealing with the drops, and visual inspections, and deconstructive testing relating to the masonry veneer of the building. But it is the view of this Tribunal that these documents are there for the purpose of assisting the Tribunal in attempting to determine the extent, in a monetary way, and in a photographic way, of those deficiencies clearly identified in the conciliation report.

As indicated at the outset of the hearing, the Tribunal was prepared to entertain objections from counsel to any of these reports during the course of the hearing, and to make an appropriate ruling. Counsel for Richmond Square, and in fact, its client, chose not to avail itself of this opportunity, and left the proceedings during that first day of the hearing. Nevertheless, during the course of the hearing, a representative from the London agents for counsel for the developer was present, and could have, at any time, brought any concerns that he might have had, to the attention of the counsel for the developer. The counsel for the developer chose not to avail himself of the opportunity to deal with those matters in this forum."

Where a Tribunal balances the reasons for a requested adjournment against the right of other parties to have the matter dealt with expeditiously, it does not act arbitrarily.

Richmond Square had the opportunity to inspect the key documents in the Program's exhibit briefs in advance of the hearing.

The Tribunal stated that it was prepared to hear objections from Richmond Square regarding each document when it was referred to in evidence and that it would assess the objection in light of the importance and complexity of the document. Richmond Square chose to reject this opportunity by

walking out of the hearing. It was that act of departure that precluded further objections to specific documentary evidence.

The key documents were produced a year before the hearing. The supplementary documents contained no new allegations.

In my view, the Tribunal acted properly in refusing the adjournment.

I would not allow the fresh evidence to be introduced. It adds nothing to what was put before the Tribunal. It is simply an attempt to put a fresh spin on the original argument for adjournment. Even if the fresh evidence was allowed it would not alter my opinion about the propriety of the adjournment. The Tribunal fairly considered the harm to both sides and gave a reasoned decision and concluded that the hearing should proceed.

The second ground argued was that there was no s.16 hearing.

Section 16 states:

16. (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision,

together with written reasons therefor on the person or owner affected.

(2) A notice under subsection (1) shall inform the person served that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection (1) is served on him, notice in writing requiring a hearing to the Corporation and the Tribunal, and he may so require such a hearing."

Section 14 deals with payments from the guarantee fund for breach of warranties. It strains credulity to suggest that the Tribunal did not address warranties. Line 4 of the reasons says "we will deal with the issues, first of all with reference to the warranties". Further, it refers to evidence of extensive warrantable deficiencies.

This argument fails.

It was argued that failure of C.R.A.T. and the Program to apprise Richmond Square of particulars of evidence with respect to character pursuant to s. 8 of the Statutory Powers Procedure Act, R.S.O. 1990, c.S.22 amounted to a denial of natural justice.

Section 8 states:

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the

hearing with reasonable information of any allegations with respect thereto.

[Emphasis added.]

Reasonable information as to the allegations was provided to Richmond Square, as follows:

(a) particulars of the allegations of incompetence were set out in: (i) the notice of proposal (paragraphs 3 and 4); (ii) the two-part Conciliation Report; and (iii) Kleinfeldt's initial report;

(b) particulars of the allegations of bad character and improper conduct were set out in: (i) the notice of proposal (paragraphs 1 and 2); the (ii) pleadings in the court proceedings to which Richmond Square was a party and which were filed with the Tribunal; and (iii) correspondence to which Richmond Square's solicitors were privy.

This ground must also fail.

The Tribunal found as a fact that Richmond Square was afforded reasonable access to the premises for all

necessary purposes related to the hearing. I do not intend to disturb that finding.

The only aspect of the reasons with which I take issue is the decision to give the Program a blank cheque indemnity against Richmond Square. In the last paragraph the Tribunal said:

The Tribunal therefore, pursuant to the authority vested in it, directs that the Program effect the repairs required to the common elements of this condominium building, that it render an account for the cost, including administration charges, to Richmond Square Development Corporation, and that the corporation forthwith, or upon terms agreeable to the Program, pay such amounts assessed; and that the Program carry out its Proposal to refuse to renew the registration of Richmond Square Development Corporation, registration number 15-929.

I am satisfied that the question of liability for breaches of warranty has been properly determined against Richmond Square. The Program may cause repairs to be done and then sue Richmond Square for repairs. The sole issue for the Court then will be the question of damages. That is consistent with the disposition made by this Court in DeSoto Developments Ltd. v. Ontario New Home Warranty Program 8 O.R. (3d) 792. The Court there held that the Program's claim for money must be the subject to a civil action.

In fairness to the Tribunal it should be noted that its decision preceded DeSoto.

For these reasons the appeal is dismissed save and except for variation as to relief above noted.

I now direct my attention to the application for judicial review belatedly filed.

It was not properly served and was not therefore properly before us to be heard. However, Mr. Campbell, for the Program, moved to quash on the ground of abuse of process.

Where the legislature provides an appeal mechanism under statutes such as this Act, that is the only route for redress after a hearing. The application for judicial review is, therefore, quashed.

Counsel may fax the court with their arguments on costs.

Monfomer
Edward then
Gordon Killen

Court File No. 137/93

ONTARIO COURT OF JUSTICE
(DIVISIONAL COURT)

) Tuesday, the 26th day of
) October, 1993

BETWEEN:

RIVER OAKS DEVELOPMENTS INC., formerly
ANPROP INVESTMENTS INC. and
THE GREENHOUSES OF BRAMPTON INC.

Applicants
(Appellants)

and

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent
(Respondent in Appeal)

ORDER DISMISSING APPEAL

The Appellant has failed to perfect the appeal within the time prescribed by Rule 61.09(1) and has not cured the default, although given notice under rule 61.13 to do so.

IT IS ORDERED that this appeal be dismissed for delay, with costs.

DATE:

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D. Hoy
Assistant Registrar, Divisional Court

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[Signature]

Court File No. 647/91

DIVISIONAL COURT
(General Division)

McMURTRY A.C.J.O.C., CARRUTHERS and THEN J.J.

B E T W E E N:

640458 ONTARIO LIMITED, C.O.B. AS
BRANDY LANE HOMES - PICKERING

Applicants

- and -

ANTHONY BERTUZZI, ROCCHINA BERTUZZI, WAYNE CAMPBELL,
ADELINA CAMPBELL, CLEMENT HAZELL, SABIHA HAZELL, GEORGE
SCHRAM, ANN SCHRAM, BUY SEELEY, DIANE SEELEY, NEVILLE
SMITH, BURRETTA SMITH, MARVIN RAY, ANNE RAY, THE ONTARIO
NEW HOME WARRANTY PROGRAM, THE COMMERCIAL REGISTRATION
APPEAL TRIBUNAL, JAMES R. BREITHAUPT, TIBOR PHILIP GREGOR
and D.H. MacFARLANE

Respondents

Heard: June 10, 1993

E N D O R S E M E N T

There are a number of issues raised in this appeal. Firstly, the appellant raises the issue of jurisdiction in relation to the Tribunal on the following grounds:

- (a) The Tribunal did not have jurisdiction because the Home Warranty Program had not given adequate reasons for its decision;
- (b) The Tribunal proceeded in a wrong manner in that it was treating the matter as if it was being tried in the first instance, rather than restricting itself to a review to

determine whether or not there was an error in relation to the decision of the Program;

- (c) The Tribunal did not have jurisdiction to order specific work to be done but rather was confined to making an award of damages.

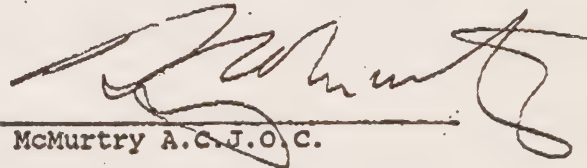
In our view these submissions with respect to the jurisdiction have no merit. Furthermore it should be noted that the appellants raised neither (a) nor (b) before the Tribunal itself. Rather, counsel for the appellants was content to allow the hearing to proceed for thirty days over seventeen months.

On the other hand, counsel for the Warranty Program submitted that the Tribunal did have jurisdiction to deal with the matter before it as if it was hearing it in the first instance. Counsel for the Program also argued that the Tribunal did have jurisdiction to "substitute its opinions for that of the Corporation" and therefore it could order specific work to be done.

The appellant submits that the claimants have not discharged the onus upon them in satisfying the Tribunal that the brick mortar was unsound and thereby required rebricking. The appellant further submits that the evidence before the Tribunal demonstrated that the mortar was in fact sound.

It is quite apparent from a reading of the evidence that the Tribunal carefully considered the fundamental issue which was whether or not the unsatisfactory workmanship required repairs to the brick or new bricking. Indeed counsel for the Warranty Program at the outset of the lengthy hearings stated that the issue before the Tribunal was one of "repairs to the brick or new bricks". There was sufficient evidence before the Tribunal to reach a decision on a balance of probabilities that the breach of the warranties in relation to the construction of the homes could only be satisfactorily remedied by removing all of the existing brick and rebricking the homes.

The appeal is therefore dismissed with costs fixed in the amount of \$12,500.00.



McMurtry A.C.J.O.C.

RELEASED: * June 15, 1993

Registrar v. Griese

351/92

Coram: Carruthers, Campbell & Then, JJ.

Heard: May 27 1993

Decided: May 27 1993

ENDORSEMENT

It is unnecessary to decide if the tribunal in these circumstances had jurisdiction to register the respondent as salesman when the proposal was to refuse registration as a broker, or denied natural justice by denying any opportunity to make submissions on that issue. Assuming it had jurisdiction, the tribunal erred in law in making the order it did.

The tribunal erred in relying on the respondent's allegation that he did not knowingly breach trust requirements in relation to his earlier conviction on charge 6 of knowingly breaching trust requirements. In respect of the other convictions the tribunal appeared to rely on the appellant's argument that although he may have done wrong, he was not guilty of knowingly breaching trust. The tribunal failed to appreciate that a plea of guilty admits every element of the offence including knowledge.

The tribunal, although it said that his respondent's reliance on Gauvreau did not minimize his responsibility, appeared erroneously to consider this a mitigating factor.

The tribunal failed to consider the cumulative effect of the past misconduct including the earlier convictions for breach of trust, the Albion financial impropriety, the Bateman financial impropriety, and the 69 Cambridge trust account problem.

The tribunal held that none of the incidents, alone, would be sufficient in themselves to justify the Registrar's proposal. That is not the test. The tribunal erred fundamentally in failing to consider the cumulative effect of the respondent's past misconduct.

The tribunal erroneously held that the Charter of Rights required it to give more weight to the very scant evidence of recent reformation than to the respondent's consistent pattern of misconduct.

It is obvious from the evidence, and the tribunal's findings, that the respondent through his past conduct - a consistent pattern of breach of trust, financial impropriety, and other business irresponsibility - proved himself unable to carry on business with an acceptable standard of honesty and legality.

As the Registrar said, salesmen "are continually coming into contact with trust funds." As the tribunal said in Bullock, November 24 1988, it is clear that only people who demonstrate that they can fulfil their fiduciary duties should be permitted to become registered as salespersons under the Act.

But for the tribunal's legal errors, its factual findings on this evidence could lead to only one result, the denial of registration under the Act as a broker or a salesman.

The appeal is allowed, the tribunal's order is set aside, and it is ordered that the Registrar carry out the proposal to refuse registration to the respondent.

Costs:

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